(27,168)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 413.

THE UNITED STATES OF AMERICA AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

a Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

b Filed Dec. 5, 1918.

Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Petition and Order for Writ of Mandamus.

Samuel Untermyer, Frank M. Swacker, Attorneys for Relator, Wilkins Building, Washington, D. C.

1 Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Petition for Writ of Mandamus.

To the Supreme Court of the District of Columbia:

Comes now Kansas City Southern Railway Company and respectfully shows to this Court:

First. That it is a corporation common carrier engaged in the transportation of persons and property by railroad between places in various States of the United States, and so subject to the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," etc., and acts supplemental thereto and amendatory thereof, including the Act of March 1, 1913 (38 U. S. Statutes at Large, page 701), commonly known as the Valuation Act, which Act, among other things, provides as follows:

2 "Sec. 19*a*. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in
3 excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed."

Second. That heretofore and in or about the year 1914 the respondent, Interstate Commerce Commission, pursuant to the provisions of said Act of March 1, 1913, embarked upon an investigation to ascertain the value of the property of the relator as of June 30, 1914, which investigation continued from time to time until the 15th day of November, 1918, and involved the taking of many thousands of pages of testimony; involving an expense of over $250,000 to the relator, besides the very large sum expended by respondent.

Third. That during the course of said investigation by respondent of relator's property, in May, 1917, respondent and relator entered into stipulations concerning said investigation, containing, among others, the following provisions:

"Stipulation.

The following is a copy of the stipulation entered into between the representatives of the Carrier and of the Bureau of Valuation with respect to certain matters put in issue by the Carrier's Protest to the Tentative Valuation:

Stipulations.

The following agreement is entered into between the Division of Valuation of the Interstate Commerce Commission (subject
4 to the approval of the Commission) and The Kansas City Southern Railway Company and subsidiary companies named in the protest filed by them herein (all hereinafter referred to as the 'Carrier'), and the same shall be filed as a part of the record herein without prejudice to the right of either party to supplement same by the introduction of testimony as to any matter not finally disposed of herein.

It is further agreed that in the event the Commission shall disapprove the action of the Bureau of Valuation in any particular matter, then insofar the Carrier shall be absolved from the obligation devolving upon it; and further, that this stipulation is made wholly without prejudice to any right which the Carrier may have under the law to obtain a judicial review of the determination which the Commission shall make in the premises, either with respect to question of law or of fact, save such facts as are expressly admitted.

* * * * * * *

Lands.

1. Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods; first, by taking each individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not
5 to be resorted to if the second method can be made available.

It is therefore understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such multiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and to introduce testimony in modification of the same which it has as to any other fact stated in the Tentative Valuation.

If, in the opinion of the Commission, it transpires, at any stage of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

Fourth. That during the time the respondent was engaged in its investigation of relator's property, it was also engaged in an investigation to ascertain the value of the property of the Texas Midland Railroad Company, which investigation it completed December 14, 1917, and on July 31, 1918, rendered its decision, report and findings, which are set forth in Valuation Reports of the Interstate Commerce Commission No. 1, at page 1, and here referred to as though set out in full. As appears by reference to said report (page
6 52 to 62, inclusive, a copy of which is hereto annexed as Exhibit A hereof), the respondent, notwithstanding the express direction contained in the paragraph nominated second of Section 19*a* of said Act of March 1, 1913, above set forth, refused and declined to find and report with respect to lands owned and used by said Texas Midland Railroad Company the then "present cost of condemnation and damages or of purchase in excess of such original cost or present value," basing its said refusal upon respondent's inter-

pretation of the decision of the Supreme Court of the United States in the Minnesota Rate Case, 230 U. S. 352.

Fifth. That after respondent had reached the conclusions set forth in said Texas Midland Railroad Company valuation above mentioned upon August 29, 1918, it notified the relator that it would not adopt the plan of determining the present cost of condemnation and damages or purchase set forth in the stipulation above mentioned, and in conformity with the other provisions thereof assigned the subject for hearing and the introduction of proofs before an examiner of respondent at Kansas City, Missouri, September 9, 1918. That thereupon relator commenced the preparation of evidence with respect to such present cost of condemnation and damages or purchase with respect to each parcel of land owned or used by it, and on September 9, 1918, proffered evidence thereof, the admissibility of which, in view of said Texas Midland decision, was questioned by counsel for respondent and thereupon excluded by said examiner of respondent.

Sixth. That on October 1, 1918, relator filed its motion
7 with respondent to overrule said examiner and take such evidence so offered by relator in accordance with the provisions of said Act of March 1, 1913, and on October 4, 1918, respondent made its order directing that said matter be re-opened for the taking of testimony and assigned the same for hearing before one of its examiners upon October 7, 1918. That said examiner, on said date, proceeded to take and receive testimony and evidence upon said subject, and relator produced evidence thereon respecting so much of its lands as are located in Kansas City and Jackson County, Missouri, and relator sought and offered to introduce testimony and evidence in relation to the remainder of its line of railway, some 700 miles or more in length, but said examiner, acting upon the direction of respondent, declined and refused to receive such evidence; and respondent directed that the hearing upon the valuation of relator's property be thereupon closed and the entire matter of the valuation of relator's property set for argument before respondent October 17, 1918.

Seventh. That on October 17, 1918, the relator renewed its application before respondent to be allowed to make proof concerning such present cost of condemnation and damages or purchase with respect to the remainder of its line, and counsel for relator accompanied said motion with an affidavit setting forth the facts and circumstances in relation to said matter, a copy of which is hereto attached and marked Exhibit B, but respondent, declining then to rule upon said motion, required counsel for relator to proceed with final arguments upon the whole valuation of relator's property. Counsel for relator renewed

said motion in the course of said argument and again at
8 the conclusion of said final argument, and subsequent thereto, on November 15, 1918, was advised by respondent that at its session on that date it had adopted a resolution in words as follows:

"Voted that, for the reasons stated in the report in the Texas Midland case, the motion of counsel for the Kansas City Southern Railway Company in the Kansas City Southern valuation case to take further testimony as to the present cost of condemnation and dam-

ages or acquisition of carrier lands of the petitioner be overruled, Chairman Daniels voting in the negative."

Eighth. That respondent has concluded its investigation with respect to relator's property without complying with the requirement above set forth, of said Act of March 1, 1913, with respect to present cost of condemnation and damages or of purchase in excess of original cost or present value, which requirement respondent has definitely informed relator it does not intend to comply with for the reasons above stated, and it is now considering and preparing and will make its report upon relator's property without making such finding.

Ninth. That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by condemnation during four years immediately preceding said valuation at an actual cost to relator of $180,000; and in the aggregate will result
9 in a finding with respect to said lands at least $5,000,000 less than the value so directed by the Act of Congress above mentioned to be found. Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Te as Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it.

Tenth. That as said Act of Congress makes no provision for a review of the proceedings and findings of respondent with respect to its valuations, the relator is without a complete and adequate remedy for the great injury it will suffer by reason of the denial by respondent of the rights accorded it by said Act of Congress, and the injury which will result from respondent's proposed incomplete finding; and the relator will suffer great damage and injury as a result of said proposed course unless this Court, by issuing its writ of mandamus, directs respondent to comply with the requirements of said Act.

Eleventh. That no other or previous application for the relief prayed for herein has heretofore been made to any Court or Judge.

Wherefore, relator prays for an order herein directing that a peremptory writ of mandamus go to the respondent directing and requiring it to investigate, take and receive testimony, including such competent proof as relator may offer, in accordance with the provisions of said Act of March 1, 1913, upon, and ascertain, find
10 and report in detail, the present cost of condemnation and damages or of purchase in excess of original cost or present value of lands owned or used by relator: or, if the Court be not minded to issue its peremptory writ, then that its order issue directing that an alternative writ of mandamus go, commanding the re-

spondent to perform the aforesaid acts or to show cause why a peremptory writ of mandamus to that effect should not go.

And that the relator have such other or further order or relief as to the Court may seem just and proper.

And as in duty bound the relator will ever pray.

Dated, New York, December 3, 1918.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
By G. C. HAND, *Secretary.*

SAMUEL UNTERMYER,
FRANK M. SWACKER,
Attorneys for Relator, Wilkins Building, Washington, D. C.

STATE OF NEW YORK,
County of New York, ss:

G. C. Hand, being duly sworn, deposes and says:

I am Secretary of the Kansas City Southern Railway Company, and executed and subscribed the foregoing petition on its behalf.

I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

G. C. HAND.

Subscribed and sworn to before me this 3rd day of December, 1918.
[SEAL.] RAPHAEL BRILL,
Notary Public, No. 250, New York County.

11 EXHIBIT A.

Valuation Reports of the Interstate Commerce Commission.

Valuation Docket No. 2.

Texas Midland Railroad.

Submitted December 14, 1917. Decided July 31, 1918.

Report of the Commission.

* * * * * * *

Lands.

The protest raises two questions, which in fact are one: (1) Shall the Commission ascertain and report the reproduction cost of carrier lands, and (2) shall the Commission ascertain and report the present cost of condemnation and damages or of purchase of the carrier's lands? Together these questions present the issue as to the duty of the Commission to report the reproduction cost of lands.

What is meant by present value, as the term is used in the tentative valuation, is thus defined by the director of valuation:

"Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use. Nothing is included for the expense of ac-
12 quisition, nor for severance damages, nor for interest during construction."

The second paragraph in the act, entitled "First," is general in terms, and directs the Commission to ascertain and report in detail as to each piece of property owned or used by the common carrier under investigation for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reasons for their differences, if any. There is no substantial question raised by the protest as to the reporting of original cost to date of lands. The essential question is with respect to the reporting of the cost of reproduction new.

The paragraph of the act entitled "Second" requires:

"Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value."

The paragraph entitled "Third" relates to property held for purposes other than those of a common carrier; and such investigation and report is required to show separately such property and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

13 The sixth paragraph, entitled "Fifth," relates in part to land grants, which are not here involved. The paragraph also provides:

"The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the government of the United States or by any state, county, or municipal government, or by individuals, associations, or corporations."

It was suggested upon argument that the paragraph entitled "Second" could apply only to properties as to which there had been an original cost, and that lands which cost the carrier or its predecessors nothing were governed by the paragraph entitled "Fifth." It was urged that lands which cost the carrier nothing were to be excluded from the direction in paragraph "Second" as to the ascertainment of the original and present cost of condemnation and damages or of purchase in excess of such original cost and present

value. Unless the present cost of condemnation and damages or of purchase is to be reported, which is not contemplated by the tentative report, it is unnecessary to construe these two paragraphs with respect to this contention. Applying familiar rules of statutory construction, the fact that lands, rights of way, and terminals are given specific detailed treatment in paragraphs "Second" and "Fifth" of the act points out that the latter specific requirements are to be followed rather than the preceding general language.

However, the direction in paragraph entitled "Second" for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of re-
14 production of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again it is to be taken as not existent. It seems sophistry to contend that lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier to pay sums in excess of the value of the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights. It was testified that inquiry had shown that a relationship could be found in particular cases between the sums which the carrier must pay and present or market value of a like area of similar contiguous property; and it was claimed that such sum could be estimated in advance of construction within a few per cent of the amount which would actually be required. There is also testimony that certain state commissions, in attempting to determine the cost of reproduction of railroad lands, had made use of multiples of the value of adjacent, similar land for this purpose.

But it will be observed that in each of these cases, other
15 than the state commission valuations, the testimony before us related to the actual production of a railroad where no railroad had been before; and in none of these cases did the facts exist which necessarily must be assumed for a rational conception of the process of reproduction. That there is a marked difference between assuming in advance the total cost of acquisition whether as the result of condemnation and damages paid or of purchase, in excess of the present value of similar lands in the vicinity, when no railroad has been constructed or is in operation, and the attempt to ascertain and state the cost of reproducing or reacquiring, at the present time lands which actually have been severed from the adjacent property, have been converted into a railroad, and are being occupied by an operating rail carrier, seems clear.

We are unable to differentiate the character of testimony before

us from that which was before the Supreme Court in the Minnesota Rate Cases, supra. That decision, rendered June 9, 1913, slightly over three months after the enactment of the act, was the climax of a long series of attempts made by various state commissions and courts to apply the cost of reproduction theory to railroad lands.

The Supreme Court pointed out the nature of the assumptions which must be made in the endeavor to apply the cost-of-production theory to lands. In those cases was involved the estimate of the value of the property of the railroad within the state of Minnesota as a necessary factor in determining whether the legislative-made rates at issue were confiscatory. The question presented, said the Court, was as to the soundness of the underlying estimate of
16 value, and whether it might be accepted as a basis for a finding that the rates were confiscatory.

In the master's report was an item for "lands for right-of-way, yards, and terminals, $21,024,562," which did not include any improvements. This value was arrived at by adding 5 per cent to the appraisement of the terminal properties "for the cost of acquisition and consequential damage," and 25 per cent was added in the case of the Duluth terminals for railway value, cost of acquisition, and consequential damages. The manner in which the base figure was deduced is afterwards stated herein. There was a protest by the state authorities against the sum so reported, and the court thus summarizes the basis for the protest:

"It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of 'cost of reproduction'; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right-of-way, yards and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state and the location, population, and activities of town, villages, and cities, were as they now are." (P. 444.)

The method pursued in ascertaining the base figures is thus stated by the Supreme Court:

"(*a*) Lands outside terminals.—The complainants' witness was Mr. Cooper, the land commissioner of the company, who has charge of the land grants for its entire system, of its right-of-way and
17 land purchases, and has had a wide experience in connection with land values along the lines of railway. In the latter part of 1906, the state notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column, of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report. From the information he received in special inquiries, and his own knowledge, and following what he understood to be the instructions from the state, he set down under the heading of 'market value,' not the market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land. This

included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right-of-way. It did not, however, embrace an allowance for payments which might have to be made for improvements that possibly might be found upon the property in such case, or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. These supposed additional outlays he undertook to estimate. For this purpose he increased the 'market value' as stated (in the case of agricultural lands generally multiplying it by three) and thus reached the amount set down as the 'value for railway purposes.'" (P. 445.)

Local real estate experts were employed to appraise the terminal properties at St. Paul, Minneapolis and Duluth. They were instructed "to make a conservative report of the cost of reproducing the properties owned by the company in each of their respective cities." Mr. Cooper, after discussing with these experts the estimates made by them, employed his own knowledge and formed his own judg-
18 ment, which he reported to the state under the heading of "market value." His estimate of market value was "what it would cost the company to purchase these lands, exclusive of improvements that might be made upon them, severance and consequential damages and expenses incident to acquisition." The master adopted the Cooper figures without change as to the St. Paul and Minneapolis terminals, and added 5 per cent to cover the cost of acquisition and consequential damages. As the Duluth appraisement seemed to have been based upon the ordinary value of real estate, and not on as liberal a basis as that at the twin cities, the master added 25 per cent for "railway value cost of acquisition and consequential damages."

"In reviewing the findings, the court below reached the conclusion that 'the master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value.'"

"From our examination of the evidence we are unable to conclude that the excess stated may be thus limited. What is termed the normal value does not satisfactorily appear. It further will be observed—from the summary of valuations we have set forth in the margin—that the amount thus allowed in item 1 for lands, yards, and terminals, both in and out of the three cities ($21,024,562), was included in the total on which 4½ per cent was allowed in item 30 for 'engineering, superintendence, legal expenses,' and again was included in the total on which 5 per cent was allowed in item
19 37 for 'contingencies,' and, in addition, was included in the total on which 10 per cent was allowed in item 39 for 'interest during construction.'" (P. 450.)

The fundamental objections to the application of the theory of reproduction to railway lands are thus stated by the court:

"These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it can not be supposed that they would be disregarded." (Pp. 450-451.)

The manner in which the "railway value" was found has
20 been stated. It was based on a consideration of the market value in the usual acceptance of the word, to which was added what it was estimated it would cost the railroad to acquire the land, and the sum was multiplied by three, in the case of agricultural lands, so as to cover improvements which might be on the land and the consequential and severance damages, and the cost of acquisition. Then the court states the usual rules of damages upon condemnation of lands:

"* * * supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its fair market value for all its available uses and purposes. * * * If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. * * * But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. * * * The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership * * * There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained." (Pp. 451-452.)

The court then points out what must be assumed in an attempt to estimate the cost of reproduction of lands:

21 "Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right-of-way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry and trade. Communities have long been dependent on its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture." (P. 452.)

"The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—

22 men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a 'reproduction' were considered. The railroad right-of-way was conceived to be a property sui generis, 'a large body of land in a continuous ownership,' representing one of the 'highest uses' of property and possessing an exceptional value. The estimate before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the 'railway value' of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided." (P. 453.)

What is "the substantial question to be decided"?

"That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right-of-way not only in

excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void be-
23 cause they do not permit a return upon an increment so calculated?" (Pp. 453, 454.)

After a short examination of the nature of public service property the court answers its own query:

"* * * And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

"The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

"Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can not
24 properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right-of-way, yards, and terminals upon the so-called 'railway value' of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, with additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which

were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'

"By reason of the nature of the estimates, and the points to which the testimony was addressed, the amount of the fair value of the company's land can not be satisfactorily determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive." (Pp. 454-456.)

It is contended that the Minnesota Rate Cases decision is inapplicable here because what was condemned in that case was the particular method there employed to show the cost of reproduction of land, and not what is here suggested by the carrier's witnesses as possible. It is urged that in the Minnesota Cases the market value of the railroad lands was not shown. What was condemned was the theory that the cost of reproducing the lands occupied by a railroad can be determined by a process of assuming a "railway value"
25 estimated in multiples of the present fair average value of similar lands in the vicinity, and the condemnation of the court was upon the ground that impossible and contradictory assumptions must necessarily be the basis for the attempt to ascertain the present cost of a railroad's lands. We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear.

The decision in the Minnesota Cases has since been generally accepted by courts and commissions as settling the disputed question whether the cost of reproduction theory could be made to apply to lands of a railway. See Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35, 42; Chicago & N. W. Ry. Co. v. Smith, 210 Fed. 632; Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

In the Denver Water Case in the United States district court for the district of Colorado, to enjoin the enforcement of rates filed by authority of law, the special master reported, inter alia, the value of the utility's lands. He said:

26 "The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. Minnesota Rate Cases, 230 U. S. 352, at 449-456. It follows from this rule that the original cost of the lands is not necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance dam-

ages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question in my judgment, always is, What is the present market value of similar lands in the same locality and not what are these lands worth now to the water company for the purposes for which they are now used?"

The utility excepted "because the master erred, as a matter of law, in refusing to consider, in determining the fair value of the lands, anything on account of the actual or estimated consequential or severance damages," and because he "erred in refusing to consider, in connection with the determination of the fair value of the lands,
or to include therein, anything whatever on account of over-
27 head expenses," claimed to be at least 10 per cent of the value of the lands for ordinary purposes. These exceptions were stricken by the district court. On appeal and cross appeal to the United States Supreme Court, that court treated as established the propriety of estimating the utility's property on the basis of present market values as to lands, and said that the method was fairly applied by the special master and was hardly disputed by the appellants, except as to certain matters other than his treatment of land. Denver v. Denver Union Water Co., 246 U. S. 178.

The use of multiples in ascertaining the cost of reproduction of lands embraced in railroad rights of way was discontinued by the Washington and California commissions, reversing their former practice and their earlier decisions. Public Service Comm. v. Seattle, Renton & S. R. Co., 4 Wash. Pub. Serv. Com. Ann. Rep. (1914), 132, 134; In re Value of Quincy Western Ry. Co., 8 Cal. R. R. Com. Dec. 340. This interpretation of the Minnesota Cases has been accepted as to telephone rights of way by the Colorado and Washington Commissions. Re Mountain States Teleph. & Teleg. Co., Colo. Pub. Util. Comm., P. U. R., 1917, B. 198, 265; Public Service Comm. v. Pacific Teleph. & Teleg. Co., Wash. Pub. Serv. Comm., P. U. R., 1916, D. 947, 54 A. T. & T. Co. Com. L., 171, 174. Certain other state commissions have never used multiples for the purpose of determining the cost of reproduction of lands. Re Illinois Terminal Ry. Co., 4 Ill., P. U. Com. Rep. 263, 266; Re Portland Ry. L. & P. Co., Oreg. Pub. Serv. Comm., P. U. R., 1916, D., 976, 1022.

Not alone do the uncertainties which we have referred to surround
what would be the conditions of ownership, of improvement.
28 and of value of near-by property, and of general industrial development, but there can be no certainty as to what land would have to be acquired at a cost to the carriers upon reproduction or a present acquisition. The carrier has been constructed within comparatively a recent period of time; nothing in the record shows

us that the reproduction of the road would be regarded in any less friendly spirit by the community as a whole and individual owners in particular, than when the right of way and terminals in question were acquired but a few years back. As appears elsewhere in this report, of approximately 1,933,065 acres of carrier lands, 511,008 acres were acquired by the carrier through aids, gifts, grants of right of way, and donations.

Of the total original cost of the carrier lands, approximately 40 per cent was donated by citizens of various communities along the line. That all such donated lands would necessarily have to be bought or condemned and paid for at the full amount which a jury would award on condemnation is an assumption we do not feel warranted in making from the record before us. Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto.

29 EXHIBIT B.

Before the Interstate Commerce Commission.

Valuation Docket No. 4.

In the Matter of the Valuation of the Property of THE KANSAS CITY SOUTHERN RAILWAY COMPANY et al.

Affidavit.

STATE OF MISSOURI,
County of Jackson, ss:

S. W. Moore and J. M. Souby, each being first duly sworn, upon his oath says:

Following the service upon the Carrier by the Interstate Commerce Commission of the tentative valuation of its property in November, 1916, we both entered upon active charge of the case as attorneys for the Carrier and after the preparation and filing of the protest against the tentative valuation proceeded in the collection and preparation of evidence regarded by us as necessary to sustain the allegations of fact made in the protest. Among other things we deemed it advisable to have evidence as to the cost of acquiring the lands of the Carrier by purchase or condemnation at valuation date. Upon taking charge of the case, we had learned that an appraisement had previously been made on behalf of the Carrier of its entire right of way and other lands on the basis followed by the Bureau of Valuation, designed to serve as a check upon the similar work of the

Bureau; that is, there had already been made an appraise-
30 ment of the fair market value on valuation da'e of the naked land adjoining and adjacent to the lands of the Carrier and regarded by the particular appraiser as of similar character and of about the same average value as the Carrier's lands, such appraisal having been made as to each county separately by an experienced real estate man employed in each county for that purpose. No appraisal had been made, however, of the cost of acquiring the Carrier's lands by purchase or condemnation as provided by the Valuation Act. Accordingly, before the first assignment of this case by the Commission for the taking of testimony generally, we made arrangements in March, 1917, for the making of such appraisement of the Carrier's lands in Kansas City and Jackson County, Missouri, and this work was undertaken and carried out immediately by Mr. Frank McMillan. On March 6, 1917, at Kansas City, it was agreed with the Director of Valuation that the Carrier would not be expected to present this class of testimony at the hearing before the Commission then set for March 19, 1917, as appears from letter signed by S. W. Moore and Pierce Butler dated March 7, 1917, and addressed to the Director, hereto attached and marked Exhibit "A" and the Director's reply thereto dated March 9th, 1917, hereto attached marked Exhibit "B."

Before similar arrangements had been made for carrying out this work on the balance of the line, we both attended the general hearing in Washington in the several consolidated cases, beginning March 19th, 1917, at which evidence was taken upon this subject of the cost of acquiring railroad lands. In view of the admissions made by the Director of Valuation at that hearing (see printed transcript of testimony, pages 672 and 673) to the effect that the use of
31 a multiplier to determine cost of acquisition of lands in excess of the naked value of adjoining lands was feasible, we felt that there was every possibility of our being able to reach an agreement with the Bureau of Valuation with respect to this matter, which would entirely obviate the necessity of taking testimony thereon, and accordingly decided to defer undertaking the contemplated appraisements of the Carrier's lands south of Jackson County, Missouri, until such time as we found it impossible to make such agreement.

Upon our return from Washington we began negotiations with the representatives of the Bureau of Valuation at Kansas City with respect to various other matters put in issue by our protest, in an effort to reach an agreement with respect thereto which would eliminate the necessity of covering the same by testimony. In the meantime this case was set down for the hearing of testimony at Kansas City on May 23, 1917. In a letter of May 12th, 1917, however, the Director advised that the case might be continued, but he would come on to Kansas City in any event, arriving on May 22, 1917, the purpose of such visit being as he expressed it, in his letter of May 18th, 1917, "to look over matters with you and possibly reach some agreement as to some disputed issues." Such a visit for this purpose had already been promised by the Director in an earlier letter, dated April

24, 1917, which is attached hereto, marked Exhibit "C." By order of the Commission entered May 19th, 1917, the hearing was continued indefinitely, a letter from the Director dated May 18, 1917, stating that such an order would be entered on account of the fact that the hearing in the Texas Midland case was still going on.

32 At a conference with the Director beginning on May 22, or May 23, 1917, an agreement was reached with respect to the matter of ascertaining the cost of acquiring lands by purchase or condemnation identical with or substantially identical with that finally employed in the stipulation which has been filed in this case (our Abstract, pp. 969-970), as follows, to-wit:

"Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods: first, by taking each individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

"It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not to be resorted to if the second method can be made available.

"It is, therefore, understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such multiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and introduce testimony in modification of

33 the same which it has to any other fact stated in the Tentative Valuation.

"If, in the opinion of the Commission, it transpires, at any state of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

In reliance upon the agreement then reached, we regarded it as wholly unnecessary and consequently as involving an unnecessary expense to proceed further with the preparation of testimony of any character relating to this question. The whole matter was allowed to rest until the service upon the company of notice on August 29th, 1918, that the stipulation in certain respects was not approved by the Commission and that a hearing would be held at Kansas City Sep-

tember 9, 1918, for the purpose of giving the Carrier an opportunity to offer evidence on all questions left open by the stipulation and affected by the Commission's failure to adopt the same.

At the time of the service upon the Carrier of this notice of hearing for September 9, 1918, Mr. Moore having severed all connection with the Carrier and occupying the position of General Solicitor to the Federal Manager of the Carrier's properties, had likewise for the time being ceased to participate as a representative of the Carrier in this case. It was not until about September 7th, 1918, that he received notice that Judge Payne, at the request of the General
34 Counsel of the Company, had assented to his further participation in the case as counsel for the Carrier.

Mr. Souby, who was still representing the Carrier in the case, was absent from the city and had no knowledge of the hearing until his return on September 3, 1918. Shortly after his return and some three or four days prior to the date fixed for the hearing, he held a conference with the Valuation Attorney, Mr. C. F. Newman, with respect to the character of evidence which he intended to offer on behalf of the Carrier. When the matter of testimony with respect to the question of the cost of acquiring lands at date of valuation by purchase or condemnation was discussed, Mr. Newman stated that it was his intention to object to the introduction of any such evidence because, as he understood the effect of the Commission's decision in the Texas Midland case, such evidence would not be considered by the Commission. Mr. Souby, feeling confident that such an objection made by the representatives of the Bureau of Valuation would in all probability be sustained by the Examiner, decided that it would be fully sufficient for the protection of the Carrier to make an offer of same with respect only to Jackson County, and the record of the hearing shows that such was done. The action of the Examiner in sustaining the objection to this character of testimony was in effect overruled by the Commission when it set the case for hearing on October 7, 1918, for the sole purpose of taking evidence with respect to this question. The notice of the last mentioned hearing was received by the Carrier's representatives at Kansas City on Friday, October 4th, 1918, but one week day intervening between the date of the notice and the date fixed for the hearing.

35 If it had appeared at the time of the receipt by Mr. Souby of the notice of the hearing fixed for September 9th, 1918, that testimony of the character here under consideration would be received by the Examiner, there would have been time intervening between such date and the date of the hearing and the time which would be consumed in introducing the testimony which the Carrier was already prepared to offer, to enable it to make a beginning in the preparation of testimony with respect to the cost of acquiring its lands south of Jackson County, Missouri, although such testimony would of necessity have been hastily prepared and therefore not entirely satisfactory. There was not time, however, after receipt of notice of hearing set for October 7, 1918, to make any sort of preparation for such testimony and have it available for introduction in evidence at the hearing fixed for that date, and accordingly we

did not undertake to have such appraisement started, but undertook instead to secure some agreement with the representatives of the Bureau of Valuation and with the Commission which would enable us to secure and offer same.

The notice that hearing would be had at Kansas City on October 7, 1918, was received in the form of a telegram from Commissioner B. H. Meyer, addressed to Mr. Souby, dated October 3rd and received here October 4th. On October 5th the following telegram, signed by Mr. Souby, was sent to Commissioner Meyer:

"Your telegram third instant re Kansas City Southern Valuation. When testimony was taken here Sept. ninth there was an advance understanding that our evidence as to cost of acquisition of lands would be excluded in view of Commission's ruling in Texas
36 Midland case and that our contention would be preserved by offers of testimony, and this was done. Stop. Legal Evidence of the cost of acquisition by purchase or condemnation should I suppose in the absence of some agreement to the contrary, be directed to each parcel or tract of land and this data we had assembled for Kansas City and Jackson County when the stipulation pages nine sixty nine and nine seventy of our abstract was made which rendered unnecessary the assembling of similar data at other points on the line. We are prepared to introduce all the testimony that we have at the hearing beginning here next Monday, but it is utterly impossible to secure similar data on some seven hundred miles south of Jackson county in time for hearing now set for October seventeenth. Will not the Commission in view of this situation consent that outside of Kansas City and Jackson County we may introduce testimony showing cost of acquisition by the percentages or multiples over normal land values, without making a separate problem of each tract or parcel."

On October 7th the taking of testimony began before Examiner Kimball at Kansas City and we proceeded to introduce our testimony with respect to the cost of acquisition by purchase or condemnation of the lands of the Carrier at valuation date in Jackson County, Missouri, including Kansas City, which, as above stated, had been previously prepared. We frankly stated to the Examiner and to Mr. Benton and Mr. Newman, counsel for the Bureau of Valuation, that we were not prepared to introduce testimony except as to Jackson County, Missouri, for the reason, as above stated, that the necessary data had not been assembled and the witnesses had not been qualified, because reliance had been placed upon the stipulation.

37 No answer having been received from Commissioner Meyer to our telegram of October 5, 1918, we had a conference with Messrs. Kimball, Benton and Newman on October 8th, giving them a copy of our telegram to Commissioner Meyer of October 5th above quoted, and we suggested that arrangement be made by which time might be given us within which to qualify our witnesses upon the subject of the cost of acquisition of the Carrier's lands by purchase or condemnation, south of Jackson County, Missouri. After a full discussion of the matter, the gentlemen named, on October 8th, sent the following telegram to Commissioner Meyer:

"Situation is that Carrier is now introducing evidence in tabular

form showing original cost and value at time of acquisition of all lands Jackson County including Kansas City. Carrier not in position to introduce like testimony for balance of line but if we proceed now must introduce oral evidence showing value at time of acquisition for each parcel of entire line (which will perhaps take two or three weeks) Souby proposes to adjourn hearing submitting whole matter to Commission on seventeenth Period. If Commission decides to take further testimony Carrier will at subsequent date be prepared to introduce it in tabular form for any or all counties.

Souby ready to make agreement as follows which Benton and Newman recommend.

Evidence Kansas City and Jackson County to be taken Carrier claims evidence typical in principle of all counties Bureau does not admit it is typical and reserves right on order of Commission to take evidence covering counties claimed to be typical Case to be argued seventeenth before Commission all questions Period. After argu-
ment Commission to decide before report whether evidence
38 covering any or all other counties shall be taken Carrier
agrees that if Commission determines to apply multiple comma the multiple two may be applied outside cities in all other counties without taking further evidence except as Commission may take typical counties upon request Bureau Period. If evidence taken after argument neither party to claim oral argument before Commission but may file brief or make oral argument before Examiner Thereupon Commission may render decision upon all issues raised by protest period. Souby's agreement is subject to approval Untermyer now requested by wire Untermyer to advise Commission direct."

The foregoing telegram came to our notice October 9th, and a telegram was immediately sent to Samuel Untermyer, General Counsel of the company at New York City, asking for authority to join in proposed agreement. The requested authority was duly received, and accordingly a telegram to that effect was sent to Commissioner Meyer on October 9th, as follows:

"Suggestion wired you yesterday by Kimball, Benton and Newman is satisfactory to Mr. Untermyer, Souby and myself, with understanding that if Commission determines to ascertain and report cost of acquisition of lands by purchase or condemnation such data shall be ascertained for entire line by taking of testimony or agreement upon multiple."

No reply to either telegrams has been received from Commissioner Meyer.

When we had concluded the introduction of testimony as to Jackson County, on October 10th, 1918, as aforesaid, we asked the Examiner to adjourn the hearing until witnesses could be prepared to
testify as to lands south of Jackson County. There was
39 an extended conference upon this subject. We explained at
length that the testimony was not then available, for reasons heretofore stated, but that we would proceed with all speed to make it presently available. We produced before the Examiner Mr. J. L. Faris, who, with Mr. Edwin (who was likewise in the city and available) were familiar with the lands of the Carrier covering its entire

line from Jackson County south to the Gulf, having made a joint appraisement of said lands with Mr. Minor, representing the Bureau of Valuation. Mr. Faris stated that he was prepared to leave Kansas City at once and make the necessary examination of lands in Cass County, Missouri, and return the following Monday, October 14th, and testify in reference thereto, returning immediately to qualify himself to testify with reference to the lands in the next county south and so on, and we offered to send out Mr. Edwin immediately, so that he could likewise qualify himself and return to Kansas City to give his testimony, so that the taking of testimony beginning October 14th might proceed continuously until completed, except for the time during which Mr. Souby and Mr. Moore would necessarily be absent in Washington to attend the argument of the case set for October 17th. The Examiner refused to permit any continuance or adjournment whatsoever, or to afford us any opportunity whatsoever to produce our testimony, and closed the hearing against our strong protest.

On the same day, October 10th, we sent the following telegram to Commissioner Meyer:

"Kansas City Southern Valuation. We have completed today all testimony now available, which includes cost of acquisition by purchase or condemnation of lands in Jackson County, Mo., including Kansas City. We did not assemble data and qualify witnesses to give similar testimony outside of Jackson County because we relied on the stipulation set forth in our abstract pages nine sixty nine and nine seventy. We can make a beginning on this testimony next Monday, continuing until same is completed, except during period when we are necessarily absent to attend Washington hearing now set for October 17th. Examiner Kimball acting on instructions declines to adjourn hearing until next Monday so this program may be carried out. We should be permitted to introduce this testimony. The delay is no fault of ours. Will not Commission authorize examiner to hear it? Will greatly appreciate telegraphic reply."

On October 12th the following telegram was received from Commissioner Meyer, which was the only direct answer to our telegrams above quoted:

"Instructions have been wired to the examiner."

We immediately called up Mr. Newman, Valuation Attorney, to find out the meaning of the telegram, and he explained that instructions had been received to read into the record Mr. Untermyer's motion for the taking of testimony, which, as Mr. Newman advised me, had already been done. He also stated that the examiner had left Kansas City before the telegram had been received.

S. W. MOORE.
J. M. SOUBY.

Subscribed and sworn to before me this 17th day of October, 1918.

ALFRED HOLMEAD,
Notary Public.

41 Supreme Court of the District of Columbia.

At Law. 61/917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Order.

Upon the annexed petition of Kansas City Southern Railway Company, verified by its secretary, G. C. Hand, on the 3rd day of December, 1918,

It is ordered that the above-named respondent, Interstate Commerce Commission of the United States, show cause at a session of this Court, to be held in the court house of the Supreme Court of the District of Columbia in the City of Washington, on the 10th day of December, 1918, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein granting a peremptory writ of mandamus requiring the respondent to investigate, take and receive testimony, including such competent proof that relator may offer, and ascertain, find and report in detail the present cost of condemnation and dam-
42 ages or of purchase in excess of original cost or present value of lands owned or used by relator, in conformity with the provisions of the Act of Congress of March 1, 1913.

And respondent is further required to show cause at said time and place why, in case this Court shall refuse such peremptory writ, an order should not be granted directing that an alternative writ issue requiring and directing said respondent to perform the aforesaid acts in compliance with said Act of Congress, or show cause before this Court, at such time as may be fixed by this Court, why a peremptory writ of mandamus should not issue to that effect.

Sufficient reason appearing therefor, let service of this order and the papers upon which it is granted, on the respondent, on or before the 6th day of December, 1918, be deemed sufficient.

Dated, Washington, D. C., December 5th, 1918.

WALTER I. McCOY,
Chief Justice of the Supreme Court of the District of Columbia.

42*a* Filed Dec. 10, 1918.

In the Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Answer of the Interstate Commerce Commission.

P. J. Farrell, for Respondent.

43 In the Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, the respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' said bill of complaint contained, for answer thereunto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

44 I.

Answering paragraph First of the petition: Respondent admits the allegations contained in this paragraph.

II.

Answering paragraph Second of the petition: Respondent admits the allegations contained in this paragraph, except that Respondent alleges that it has not information sufficient to enable it to form a belief as to whether Relator expended $250,000 as alleged in this paragraph, and therefore neither admits nor denies said allegation.

III.

Answering paragraph Third of the petition: Respondent denies that it entered into a stipulation as alleged in this paragraph. In this connection Respondent alleges that said stipulation was entered into by and between representatives of the Relator, on the one hand, and C. A. Prouty, Director of Valuation, on the other hand, and that the latter did not have and did not claim to have authority to bind Respondent in the premises.

IV.

Answering paragraph Fourth of the petition: Respondent admits that its refusal to find and report present cost of condemnation and damages or of purchase as alleged by Relator was based upon Respondent's interpretation of the decision of the Supreme Court of the United States in the Minnesota Rate cases, 230 U. S. 352,
45 and alleges that said refusal was also based upon the impossibility of discovering any lawful or reasonable basis upon which to rest such a finding and report.

V.

Answering paragraph Fifth of the petition: Respondent admits the allegations contained in this paragraph.

VI.

Answering paragraph Sixth of the petition: Respondent admits the allegations contained in this paragraph, except that it denies that Respondent's Examiner either declined or refused to receive at said hearing of October 7, 1918, any evidence offered by Relator.

VII.

Answering paragraph Seventh of the petition: Respondent admits the allegations contained in this paragraph.

VIII.

Answering parargaph Eighth of the petition: Respondent admits the allegations contained in this paragraph.

IX.

Answering paragraph Ninth of the petition: Respondent denies that its refusal to find present cost of condemnation and damages or of purchase in excess of original cost or present value of
46 Relator's lands will result in great wrong or injury or in any wrong or injury to relator; denies that Relator has offered to

Respondent definite, competent proof or any competent proof of the present cost of condemnation and damages or of purchase as alleged by Relator, and alleges that the other allegations contained in this paragraph are based entirely upon speculation and that for this reason it is not incumbent upon Respondent to make answer to them.

X.

Answering paragraph Tenth of the petition: Respondent denies that Section 19*a* of the Act to regulate Commerce, commonly known as and called the Valuation Act of March 1, 1913, makes no provision for a review of the proceedings and findings of respondent with respect to respondent's valuations. In this connection, respondent alleges that the thirteenth paragraph of said Valuation Act reads as follows:

"If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the
47 first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order."

Respondent denies that, unless this Court issues a writ of mandamus in accordance with the prayer of relator's petition in this case, relator is without a complete and adequate remedy for any damage or injury it may suffer by reason of respondent's said refusal to attempt to find and report the present cost of condemnation and damages or of purchase of the lands included in the right of way, yards, and terminals of relator's railroad, used by relator as a common carrier in serving the general public, in accordance with paragraph entitled "Second" of said Valuation Act, set forth in relator's petition, and denies that, unless this Court issues such a writ, relator will suffer great damage and injury or any damage or injury.

XI.

Answering paragraph Eleventh of the petition; Respondent alleges that it has not information sufficient to form a belief as to whether

relator has heretofore made an application to any Court or Judge for the relief prayed for by relator in this case, but respondent assumes that relator's allegation in this connection is correct.

48 Further answering the allegations contained in relator's petition, respondent alleges: That an attempt to find and report said present cost of condemnation and damages or of purchase is an attempt to ascertain and report the actual cost of acquiring the lands included in said rights of way, yards, and terminals upon the assumption that the railroad of which they are a part is not in existence; that to make such an attempt is to indulge in mere speculation; that the railroad has long been established; that to it have been linked the activities of agriculture, industry, and trade; that communities have long been dependent upon the services of the railroad and that their growth and development have been conditioned upon the facilities it has provided; that the uses of property in the communities served by the railroad are to a large degree determined by it; that the values of property along the line of the railroad largely depend upon its existence; that the railroad is an integral part of the communal life; that the assumption of the non-existence of the railroad, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained; that the conditions of ownership of said lands and the amounts which would have to be paid in acquiring them, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination; that it is impossible to describe the conditions that would exist, or the exigencies of the hypothetical owners of said lands, upon the assumption of the removal of said railroad; that the evidence introduced before Respondent in connection with the valuation of said lands establishes that at the time said railroad was con-

49 structed a large portion of said lands was donated to Relator by members of the general public; that at said time another portion of said lands was purchased by Relator; that at said time Relator obtained title to another portion of said lands through condemnation proceedings; that upon the assumption of the removal of said railroad and of its reproduction it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by Relator, or the portion thereof Relator would have to acquire title to through condemnation proceedings; that it is apparent that the removal of said railroad and the immediate reproduction thereof would not damage in any manner or to any extent any of the lands adjoining or adjacent to said railroad or the owners of such adjoining or adjacent lands, and that it is impossible to determine that upon the assumption of the removal of said railroad the title to the lands included therein would revert to or be vested in the owners of said adjoining lands. In this connection Respondent alleges, by way of illustration, that Chapter 8 of Article 6532 of the Statute Laws of the State of Texas, which is the law in force at the present time in that State, provides as follows:

The right of way secured or to be secured to any railway company in this State in the manner provided by law, shall not be so construed as to include the fee simple estate in lands either public or private

nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way, without a new condemnation.

50 All of which matters and things Respondent is ready — aver, maintain and prove as this honorable court shall direct, and thereby prays to be hence dismissed.

INTERSTATE COMMERCE COMMISSION,
(Sig.) By P. J. FARRELL, *Chief Counsel.*

WASHINGTON,
District of Columbia:

I, Henry C. Hall, depose and say that I am a member of the Interstate Commerce Commission, the Respondent in the above entitled proceeding; that I have read the foregoing answer of Respondent and know the contents thereof, and that matters of facts therein stated are true according to my best knowledge, information and belief.

(Sig.) HENRY C. HALL,
Members of Interstate Commerce Commission.

Subscribed and sworn to before me, Alfred Holmead, Notary Public in and for said District of Columbia, this 7th day of December, A. D. 1918.

(Sig.) ALFRED HOLMEAD,
[SEAL.] *Notary Public.*

50*a* Filed Dec. 18, 1918.

Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Amended Petition and Order for Writ of Mandamus.

Samuel Untermyer, Samuel W. Moore, Frank M. Swacker, Counsel for Relator, Wilkins Building, Washington, D. C.

51 Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Amended Petition for Writ of Mandamus.

To the Supreme Court of the District of Columbia:

Comes now The Kansas City Southern Railway Company and respectfully shows to this Court:

First. That it is a corporation common carrier engaged in the transportation of persons and property by railroad between places in various States of the United States, and so subject to the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," etc., and acts supplemental thereto and amendatory thereof, including the Act of March 1, 1913 (38 U. S. Statutes at Large, page 701), commonly known as the Valuation Act, which Act, among other things, provides as follows:

52 "Sec. 19*a*. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in
53 excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed."

Second. That heretofore, and in or about the year 1914, the respondent, the Interstate Commerce Commission, pursuant to the provisions of the said Act of March 1, 1913, acting through its Bureau of Valuation which was in charge of its Director of Valuation, Hon. C. A. Prouty, began an investigation to ascertain the value of the property of the relator as of June 30, 1914. On or about November 20, 1916, the respondent published and served upon the relator a copy of its tentative valuation under the said Act. In said tentative valuation the so-called present value of the lands of the relator was fixed at $2,163,870.07, and the original cost, when acquired by the relator approximately 20 years prior thereto, was given as $2,248,058.13. Said tentative valuation did not state, nor purport to state, the "present cost of condemnation and damages or of purchase," nor the cost of reproduction, of the relator's lands, or any part thereof.

Relator, within the time limited in the said Act, duly filed its protest against said tentative valuation, in which, among other things, it protested against the failure of the respondent to find the "present cost of condemnation and damages or of purchase," or the cost of reproduction, of said lands, and prayed to be allowed to introduce competent and legal testimony, in such manner and at such
54 time as the Commission might direct, to prove the reproduction cost and the "present cost of condemnation and damages or of purchase" of all its lands. Thereupon it became the duty of the respondent to fix a time for the hearing of said protest and to hear and consider any matter relative and material thereto, in accordance with the following provision of the Act:

If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid.

Testimony was taken from time to time by the relator in support of its protest until about October 7, 1918, as hereafter more specifically set forth, and likewise, stipulations were entered into, as hereafter referred to, covering certain matters in the relator's protest where agreements between the parties had been reached. Many thousands of pages of testimony were thus taken, the entire proceeding under the Act involving a total expense of over $250,000.00 to the relator, besides a very large sum expended by the respondent.

Third. That following the filing of its protest as aforesaid, and as a result of negotiations, certain agreements were reached between re-

lator and said Bureau of Valuation, an agency of the respondent and engaged under its direction and control in the investigation and valuation of respondent's property, with respect to many of
55 the matters put in issue by relator's protest against the tentative valuation, and such agreements were embodied in a formal stipulation signed by relator and the Director of Valuation in May, 1917, and filed in said proceeding before respondent. Such stipulation contained, among others, the following provisions:

Stipulations.

The following agreement is entered into between the Division of Valuation of the Interstate Commerce Commission (subject to the approval of the Commission) and The Kansas City Southern Railway Company and subsidiary companies named in the protest filed by them herein (all hereinafter referred to as the 'Carrier'), and the same shall be filed as a part of the record herein without prejudice to the right of either party to supplement same by the introduction of testimony as to any matter not finally disposed of herein.

It is further agreed that in event the Commission shall disapprove the action of the Bureau of Valuation in any particular matter, then insofar the Carrier shall be absolved from the obligation devolving upon it; and further, that this stipulation is made wholly without prejudice to any right which the Carrier may have under the law to obtain a judicial review of the determination which the Commission shall make in the premises, either with respect to question of law or of fact, save such facts as are expressly admitted.

* * * * * * *

Lands.

1. Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods: first, by taking each
56 individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not to be resorted to if the second method can be made available.

It is therefore understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such mul-

tiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and to introduce testimony in modification of the same which it has as to any other fact stated in the Tentative Valuation.

If, in the opinion of the Commission, it transpires, at any stage of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

57 Fourth. That during the time the respondent was engaged in its investigation of relator's property, it was also engaged in an investigation to ascertain the value of the property of the Texas Midland Railroad Company, which investigation it completed December 14, 1917, and on July 31, 1918, rendered its decision, report and findings, which are set forth in Valuation Reports of the Interstate Commerce Commission No. 1, at page 1, and here referred to as though set out in full. As appears by reference to said report (pages 52 to 62, inclusive, a copy of which is hereto annexed as Exhibit A hereof), the respondent, notwithstanding the express direction contained in the paragraph denominated Second of Section 19*a* of said Act of March 1, 1913, above set forth, refused and declined to find and report with respect to lands owned and used by said Texas Midland Railroad Company the then "present cost of condemnation and damages or of purchase in excess of such original cost or present value," basing its said refusal upon respondent's interpretation of the decision of the Supreme Court of the United States in the Minnesota Rate Case, 230 U. S. 352.

Fifth. That after respondent had reached the conclusions set forth in said Texas Midland Railroad Company valuation above mentioned, upon August 29, 1918, it notified the relator that it would not adopt the plan of determining the present cost of condemnation and damages or purchase set forth in the stipulation above mentioned, and in conformity with the other provisions thereof assigned the subject for hearing and the introduction of proofs before an examiner of respondent at Kansas City, Missouri, September 9, 1918.

58 That thereupon relator commenced the preparation of evidence with respect to such present cost of condemnation and damages or purchase with respect to each parcel of land owned or used by it, and on September 9, 1918, proffered evidence thereof, the admissibility of which, in view of said Texas Midland decision, was questioned by counsel for respondent and thereupon excluded by said examiner of respondent.

Sixth. That on October 1, 1918, relator filed its motion with respondent to overrule said examiner and take such evidence so offered by relator in accordance with the provisions of said Act of March 1, 1913, and on October 4, 1918, respondent made its order directing that said matter be re-opened for the taking of testimony and as-

signed the same for hearing before one of its examiners upon October 7, 1918. That said examiner, on said date, proceeded to take and receive testimony and evidence upon said subject, and relator produced evidence thereon respecting so much of its lands as are located in Kansas City and Jackson County, Missouri, and relator, being unprepared to proceed therewith at the time, moved and requested the Examiner for an opportunity later to introduce testimony and evidence in relation to the remainder of its line of railway, some 700 miles or more in length, of a nature and character more particularly discussed in paragraph ninth hereof, but said examiner, acting upon the direction of respondent, declined and refused to grant such motion and request; and respondent directed that the hearing upon the valuation of relator's property be thereupon closed and final argument of the entire matter of the valuation of relator's property be had before respondent October 17, 1918, the date already fixed therefor.

59 Seventh. That on October 17, 1918, the relator renewed its application before respondent to be allowed to make proof concerning such present cost of condemnation and damages or of purchase with respect to the remainder of its line, and counsel for relator accompanied said motion with an affidavit setting forth the facts and circumstances in relation to said matter, a copy of which is hereto attached and marked Exhibit B, but respondent, declining then to rule upon said motion, required counsel for relator to proceed with final arguments upon the whole valuation of relator's property. Counsel for relator renewed said motion in the course of said argument and again at the conclusion of said final argument, and subsequent thereto, on November 15, 1918, was advised by respondent that at its session on that date it had adopted a resolution in words as follows:

"Voted that, for the reasons stated in the report in the Texas Midland case, the motion of counsel for the Kansas City Southern Railway Company in the Kansas City Southern valuation case to take further testimony as to the present cost of condemnation and damages or acquisition of carrier lands of the petitioner be overruled, Chairman Daniels voting in the negative."

Eighth. That respondent has concluded its investigation with respect to relator's property without complying with the requirement above set forth, of said Act of March 1, 1913, with respect to present cost of condemnation and damages or of purchase in excess of original cost or present value, which requirement respondent has definitely informed relator it does not intend to comply with for the reasons above stated, and it is now considering and preparing

60 and will make its report upon relator's property without making such finding.

Ninth. That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by judicial award in con-

demnation proceedings during four years immediately preceding said valuation at an actual cost to relator of $180,000; and in the aggregate will result in a finding with respect to said lands at least $5,000,000 less than the value so directed by the Act of Congress above mentioned to be found.

Such refusal, if persisted in by the respondent, is likely to result in a valuation of the relator's property at a value less by many millions of dollars than it is justly and fairly entitled to, and such valuation being a public record, is likely to seriously and injuriously affect the relator's credit, and impair its ability to borrow money to meet its capital requirements and to properly and economically conduct its railroad operations.

Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it, in the following manner, to wit:

61 Relator accepts, as a basis for such ascertainment, the present market value of its lands as found and determined by the respondent, and assumes that each parcel of land, having reverted to adjoining owners as it would at common law upon its abandonment, would be re-acquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation. Where an entire parcel is thus acquired the cost of its acquisition will be its market value as determined by the respondent as aforesaid, plus certain incidental costs, such as court costs, and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken as determined by the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent, plus the incidental costs as aforesaid.

Inasmuch as the purpose of the Act, in requiring the cost of reproduction of lands and other property of the relator, is that the same may be used by the respondent in ascertaining and determining the final value of all the relator's property, regardless of how the same was acquired, relator is prepared and has offered to establish the cost of reproduction or the "present cost of condemnation and damages or of purchase" of all its lands regardless of whether they were originally acquired by it through purchase, or condemnation,

62 or exchange, or by gift or donation.

Tenth. That said Act of Congress makes no provision for a direct review of the proceedings and findings of the respondent with respect to its valuations, and makes no provision whatsoever for any review except as provided in paragraph thirteen of the said Act which makes the respondent the final judge of the law and the fact

without the right of appeal therefrom and is wholly inadequate for the protection of the relator. The relator is without a complete and adequate remedy for the great injury it will suffer by reason of the denial by respondent of the rights accorded it by said Act of Congress and the injury which will result from respondent's proposed incomplete finding; and the relator will suffer great damage and injury as a result of said proposed course unless this Court, by issuing its writ of mandamus, directs respondent to comply with the requirements of said Act.

Eleventh. That no other or previous application for the relief prayed for herein has heretofore been made to any Court or Judge.

Wherefore, relator prays for an order herein directing that a peremptory writ of mandamus go to the respondent directing and requiring it to investigate, take and receive testimony, including such competent proof as relator may offer, in accordance with the provisions of said Act of March 1, 1913, upon, and ascertain, find and report in detail, the present cost of condemnation and damages or of purchase in excess of original cost or present value of lands owned or used by relator; or, if the Court be not minded to issue its
63 peremptory writ, then that its order issue directing that an alternative writ of mandamus go, commanding the respondent to perform the aforesaid acts or to show cause why a peremptory writ of mandamus to that effect should not go.

And that the relator have such other or further order or relief as to the Court may seem just and proper.

And as in duty bound the relator will ever pray.

Dated, New York, December 18, 1918.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By G. C. HAND, *Secretary.*

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
FRANK M. SWACKER,
Attorneys for Relator.

Wilkins Building, Washington, D. C.

STATE OF NEW YORK,
County of New York, ss:

G. C. Hand, being duly sworn, deposes and says:

I am Secretary of The Kansas City Southern Railway Company, and executed and subscribed the foregoing amended petition on its behalf.

I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

G. C. HAND.

Subscribed and sworn to before me this 18th day of December, 1918.

[SEAL.] JULIAN RICE,
Notary Public, No. 188, New York County.

64 EXHIBIT A.

Valuation Reports of the Interstate Commerce Commission.

Valuation Docket No. 2.

Texas Midland Railroad.

Submitted December 14, 1917.

Decided July 31, 1918.

Report of the Commission.

* * * * * * *

Lands.

The protest raises two questions, which in fact are one: (1) Shall the Commission ascertain and report the reproduction cost of carrier lands, and (2) shall the Commission ascertain and report the present cost of condemnation and damages or of purchase of the carrier's lands? Together these questions present the issue as to the duty of the Commission to report the reproduction cost of lands.

What is meant by present value, as the term is used in the tentative valuation, is thus defined by the director of valuation:

"Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use. Nothing is included for the expense of acquisition,
65 nor for severance damages, nor for interest during construction."

The second paragraph in the act, entitled "First," is general in terms, and directs the Commission to ascertain and report in detail as to each piece of property owned or used by the common carrier under investigation for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reasons for their differences, if any. There is no substantial question raised by the protest as to the reporting of original cost to date of lands. The essential question is with respect to the reporting of the cost of reproduction new.

The paragraph of the act entitled "Second" requires:

"Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value."

The paragraph entitled "Third" relates to property held for purposes other than those of a common carrier; and such investigation and report is required to show separately such property and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

The sixth paragraph, entitled "Fifth," relates in part to
66 land grants, which are not here involved. The paragraph also provides:

"The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the government of the United States or by any state, county, or municipal government, or by individuals, associations, or corporations."

It was suggested upon argument that the paragraph entitled "Second" could apply only to properties as to which there had been an original cost, and that lands which cost the carrier or its predecessors nothing were governed by the paragraph entitled "Fifth." It was urged that lands which cost the carrier nothing were to be excluded from the direction in paragraph "Second" as to the ascertainment of the original and present cost of condemnation and damages or of purchase in excess of such original cost and present value. Unless the present cost of condemnation and damages or of purchase is to be reported, which is not contemplated by the tentative report, it is unnecessary to construe these two paragraphs with respect to this contention. Applying familiar rules of statutory construction, the fact that lands, rights of way, and terminals are given specific detailed treatment in paragraphs "Second" and "Fifth" of the act points out that the latter specific requirements are to be followed rather than the preceding general language.

However, the direction in paragraph entitled "Second" for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of repro-
67 duction of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again, it is to be taken as not existent. It seems sophistry to contend that lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier

to pay sums in excess of the value of the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights. It was testified that inquiry had shown that a relationship could be found in particular cases between the sums which the carrier must pay and the present or market value of a like area of similar, contiguous property; and it was claimed that such sum could be estimated in advance of construction within a few per cent of the amount which would actually be required. There is also testimony that certain state commissions, in attempting to determine the cost of reproduction of railroad lands, had made use of multiples of the value of adjacent, similar land for this purpose.

But it will be observed that in each of these cases, other than the state commission valuations, the testimony before us related
68 to the actual production of a railroad where no railroad had been before; and in none of these cases did the facts exist which necessarily must be assumed for a rational conception of the process of reproduction. That there is a marked difference between assuming in advance the total cost of acquisition whether as the result of condemnation and damages paid or of purchase, in excess of the present value of similar lands in the vicinity, when no railroad has been constructed or is in operation, and the attempt to ascertain and state the cost of reproducing or reacquiring, at the present time, lands which actually have been severed from the adjacent property, have been converted into a railroad, and are being occupied by an operating rail carrier, seems clear.

We are unable to differentiate the character of testimony before us from that which was before the Supreme Court in the Minnesota Rate Cases, supra. That decision, rendered June 9, 1913, slightly over three months after the enactment of the act, was the climax of a long series of attempts made by various state commissions and courts to apply the cost of reproduction theory to railroad lands.

The Supreme Court pointed out the nature of the assumptions which must be made in the endeavor to apply the cost-of-production theory to lands. In those cases was involved the estimate of the value of the property of the railroad within the state of Minnesota as a necessary factor in determining whether the legislative-made rates at issue were confiscatory. The question presented, said the Court, was as to the soundness of the underlying estimate of value, and whether it might be accepted as a basis for a finding that
69 the rates were confiscatory.

In the master's report was an item for "lands for right-of-way, yards, and terminals, $21,024,562," which did not include any improvements. This value was arrived at by adding 5 per cent to the appraisement of the terminal properties "for the cost of acquisition and consequential damage," and 25 per cent was added in the case of the Duluth terminals for railway value, cost of acquisition, and consequential damages. The manner in which the base figure

was deduced is afterwards stated herein. There was a protest by the state authorities against the sum so reported, and the court thus summarizes the basis for the protest:

"It is contended that the valuatio.. .as made upon a wrong theory; that it is a speculative estimate of 'cost of reproduction'; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right-of-way, yards and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state and the location, population, and activities of town-, villages, and cities, were as they now are." (P. 444.)

The method pursued in ascertaining the base figures is thus stated by the Supreme Court:

"(*a*) Lands outside terminals.—The complainants' witness was Mr. Cooper, the land commissioner of the company, who has charge of the land grants for its entire system, of its right-of-way and land purchases, and has had a wide experience in connection with
70 land values along the lines of the railway. In the latter part of 1906, the state notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column, of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report. From the information he received in special inquiries, and his own knowledge, and following what he understood to be the instructions from the state, he set down under the heading of 'market value,' not the market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land. This included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right-of-way. It did not, however, embrace an allowance for payments which might have to be made for improvements that possibly might be found upon the property in such case, or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. These supposed additional outlays he undertook to estimate. For this purpose he increased the 'market value' as stated (in the case of agricultural lands generally multiplying it by three) and thus reached the amount set down as the 'value for railway purposes.'" (P. 445.)

Local real estate experts were employed to appraise the terminal properties at St. Paul, Minneapolis and Duluth. They were instructed "to make a conservative report of the cost of reproducing the properties owned by the company in each of their respective cities." Mr. Cooper, after discussing with these experts the estimates made by them, employed his own knowledge and formed his own
71 judgment, which he reported to the state under the heading of "market value." His estimate of market value was "what

it would cost the company to purchase these lands, exclusive of improvements that might be made upon them, severance and consequential damages and expenses incident to acquisition." The master adopted the Cooper figures without change as to the St. Paul and Minneapolis terminals, and added 5 per cent to cover the cost of acquisition and consequential damages. As the Duluth appraisement seemed to have been based upon the ordinary values of real estate, and not on as liberal a basis as that at the twin cities, the master added 25 per cent for "railway value, cost of acquisition and consequential damages."

"In reviewing the findings, the court below reached the conclusion that 'the master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value.' "

"From our examination of the evidence, we are unable to conclude that the excess stated may be thus limited. What is termed the normal value does not satisfactorily appear. It further will be observed—from the summary of valuations we have set forth in the margin—that the amount thus allowed in item 1 for lands, yards, and terminals, both in and out of the three cities ($21,024,562), was included in the total on which 4½ per cent was allowed in item 30 for 'engineering, superintendence, legal expenses,' and again was included in the total on which 5 per cent was allowed in item
72 37 for 'contingencies,' and, in addition, was included in the total on which 10 per cent was allowed in item 39 for 'interest during construction.' " (P. 450.)

The fundamental objections to the application of the theory of reproduction to railway lands are thus stated by the court:

"These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessi-

ties. It would be free to stand upon its legal rights and it can not be supposed that they would be disregarded." (Pp. 450-451.)

The manner in which the "railway value" was found has been stated. It was based on a consideration of the market value
73 in the usual acceptance of the word, to which was added what it was estimated it would cost the railroad to acquire the land, and the sum was multiplied by three, in the case of agricultural lands, so as to cover improvements which might be on the land and the consequential and severance damages, and the cost of acquisition. Then the court states the usual rules of damages upon condemnation of lands:

"* * * supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its fair market value for all its available uses and purposes. * * * If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. * * * But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. * * * The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership. * * * There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained." (Pp. 451-452.)

The court then points out what must be assumed in an attempt to estimate the cost of reproduction of lands:

74 "Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right-of-way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent on its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty.

But it does not justify the acceptance of results which depend upon mere conjecture." (P. 452.)

"The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers
75 —men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a 'reproduction' were considered. The railroad right-of-way was conceived to be a property sui generis, 'a large body of land in a continuous ownership,' representing one of the 'highest uses' of property and possessing an exceptional value. The estimate before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the 'railway value' of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided." (P. 453.)

What is "the substantial question to be decided"?

"That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right-of-way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similiarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional
76 and void because they do not permit a return upon an increment so calculated?" (Pp. 453, 454.)

After a short examination of the nature of public service property the court answers its own query:

"* * * And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

"The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

"Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can
77 not properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right-of-way, yards, and terminals upon the so-called 'railway value' of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'

"By reason of the nature of the estimates, and the points to which the testimony was addressed, the amount of the fair value of the company's land can not be satisfactorily determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive." (Pp. 454-456.)

It is contended that the Minnesota Rate Cases decision is inapplicable here because what was condemned in that case was the particular method there employed to show the cost of reproduction of land, and not what is here suggested by the carrier's witnesses as possible. It is urged that in the Minnesota Cases the market value of the railroad lands was not shown. What was condemned was the theory that the cost of reproducing the lands occupied by a
78 railroad can be determined by a process of assuming a "railway value" estimated in multiples of the present fair average value of similar lands in the vicinity, and the condemnation of the court was upon the ground that impossible and contradictory assumptions must necessarily be the basis for the attempt to ascertain the present cost of a railroad's lands. We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court as beyond the possibility of rational determination; nor is there any

essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear.

The decision in the Minnesota Cases has since been generally accepted by courts and commissions as settling the disputed question whether the cost of reproduction theory could be made to apply to lands of a railway. See Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35, 42; Chicago & N. W. Ry. Co. v. Smith, 210 Fed. 632; Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

In the Denver Water Case in the United States district court for the District of Colorado, to enjoin the enforcement of rates filed by authority of law, the special master reported, inter alia, the value of the utility's lands. He said:

79 "The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. Minnesota Rate Cases, 230 U. S. 352, at 449-456. It follows from this rule that the original cost of the lands is not necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance damages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question in my judment, always is, What is the present market value of similar lands in the same locality and not what are these lands worth now to the water company for the purposes for which they are now used?"

The utility excepted "because the master erred, as a matter of law, in refusing to consider, in determining the fair value of the lands, anything on account of the actual or estimated consequential or severance damages," and because he "erred in refusing to consider,

80 in connection with the determination of the fair value of the lands, or to include therein, anything whatever on account of overhead expenses," claimed to be at least 10 per cent of the value of the lands for ordinary purposes. These exceptions were stricken by the district court. On appeal and cross appeal to the United States Supreme Court, that court treated as established the

propriety of estimating the utility's property on the basis of present market values as to lands, and said that the method was fairly applied by the special master and was hardly disputed by the appellants, except as to certain matters other than his treatment of land. Denver v. Denver Union Water Co., 246 U. S. 178.

The use of multiples in ascertaining the cost of reproduction of lands embraced in railroad rights of way was discontinued by the Washington and California commissions, reversing their former practice and their earlier decisions. Public Service Comm. v. Seattle, Renton & S. R. Co., 4 Wash. Pub. Serv. Com. Ann. Rep. (1914), 132, 134; In re Value of Quincy Western Ry. Co., 8 Cal. R. R. Com. Dec. 340. This interpretation of the Minnesota Cases has been accepted as to telephone rights of way by the Colorado and Washington Commissions. Re Mountain States Teleph. & Teleg. Co., Colo. Pub. Util. Comm., P. U. R., 1917, B. 198, 265; Public Service Comm. v. Pacific Teleph. & Teleg. Co., Wash. Pub. Serv. Comm., P. U. R., 1916, D. 947, 54 A. T. & T. Co. Com. L., 171, 174. Certain other state commissions have never used multiples for the purpose of determining the cost of reproduction of lands. Re Illinois Terminal Ry. Co., 4 Ill., P. U. Com. Rep. 263, 266; Re Portland Ry. L. & P. Co., Oreg. Pub. Serv. Comm., P. U. R., 1916, D., 976, 1022.

81 Not alone do the uncertainties which we have referred to surround what would be the conditions of ownership, of improvement, and of value of near-by property, and of general industrial development, but there can be no certainty as to what land would have to be acquired at a cost to the carriers upon reproduction or a present acquisition. The carrier has been constructed within comparatively a recent period of time; nothing in the record shows us that the reproduction of the road would be regarded in any less friendly spirit by the community as a whole and individual owners in particular, than when the right of way and terminals in question were acquired but a few years back. As appears elsewhere in this report, of approximately 1,933,065 acres of carrier lands, 511,008 acres were acquired by the carrier through aids, gifts, grants of right of way, and donations.

Of the total original cost of the carrier lands, approximately 40 per cent was donated by citizens of various communities along the line. That all such donated lands would necessarily have to be bought or condemned and paid for at the full amount which a jury would award on condemnation is an assumption we do not feel warranted in making from the record before us. Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto.

82 EXHIBIT B.

Before the Interstate Commerce Commission.

Valuation Docket No. 4.

In the Matter of the Valuation of the Property of The Kansas City Southern Railway Company et al.

Affidavit.

STATE OF MISSOURI,
County of Jackson, ss:

S. W. Moore and J. M. Souby, each being first duly sworn, upon his oath says:

Following the service upon the Carrier by the Interstate Commerce Commission of the tentative valuation of its property in November, 1916, we both entered upon active charge of the case as attorneys for the Carrier and after the preparation and filing of the protest against the tentative valuation proceeded in the collection and preparation of evidence regarded by us as necessary to sustain the allegations of fact made in the protest. Among other things we deemed it advisable to have evidence as to the cost of acquiring the lands of the Carrier by purchase or condemnation at valuation date. Upon taking charge of the case, we had learned that an appraisement had previously been made on behalf of the Carrier of its entire right of way and other lands on the basis followed by the Bureau of Valuation, designed to serve as a check upon the similar work of the Bureau; that is, there had already been made an appraisement
83 of the fair market value on valuation date of the naked land adjoining and adjacent to the lands of the Carrier and regarded by the particular appraiser as of similar character and of about the same average value as the Carrier's lands, such appraisal having been made as to each county separately by an experienced real estate man employed in each county for that purpose. No appraisal had been made, however, of the cost of acquiring the Carrier's lands by purchase or condemnation as provided by the Valuation Act. Accordingly, before the first assignment of this case by the Commission for the taking of testimony generally, we made arrangements in March, 1917, for the making of such appraisement of the Carrier's lands in Kansas City and Jackson County, Missouri, and this work was undertaken and carried out immediately by Mr. Frank McMillan. On March 6, 1917, at Kansas City, it was agreed with the Director of Valuation that the Carrier would not be expected to present this class of testimony at the hearing before the Commission then set for March 19, 1917, as appears from letter signed by S. W. Moore and Pierce Butler dated March 7, 1917, and addressed to the Director, hereto attached and marked Exhibit "A" and the Director's

reply thereto dated March 9th, 1917, hereto attached marked Exhibit "B."

Before similar arrangements had been made for carrying out this work on the balance of the line, we both attended the general hearing in Washington in the several consolidated cases, beginning March 19th, 1917, at which evidence was taken upon this subject of the cost of acquiring railroad lands. In view of the admissions made by the Director of Valuation at that hearing (see printed transcript of testimony, pages 672 and 673) to the effect that the use of a
84 multiplier to determine cost of acquisition of lands in excess of the naked value of adjoining lands was feasible, we felt that there was every possibility of our being able to reach an agreement with the Bureau of Valuation with respect to this matter, which would entirely obviate the necessity of taking testimony thereon, and accordingly decided to defer undertaking the contemplated appraisements of the Carrier's lands south of Jackson County, Missouri, until such time as we found it impossible to make such agreement.

Upon our return from Washington we began negotiations with the representatives of the Bureau of Valuation at Kansas City with respect to various other matters put in issue by our protest, in an effort to reach an agreement with respect thereto which would eliminate the necessity of covering the same by testimony. In the meantime this case was set down for the hearing of testimony at Kansas City on May 23, 1917. In a letter of May 12th, 1917, however, the Director advised that the case might be continued, but he would come on to Kansas City in any event, arriving on May 22, 1917, the purpose of such visit being as he expressed it, in his letter of May 18th, 1917, "to look over matters with you and possibly reach some agreement as to some disputed issues." Such a visit for this purpose had already been promised by the Director in an earlier letter, dated April 24, 1917, which is attached hereto, marked Exhibit "C." By order of the Commission entered May 19th, 1917, the hearing was continued indefinitely, a letter from the Director dated May 18, 1917, stating that such an order would be entered on account of the fact that the hearing in the Texas Midland case was still going on.

85 At a conference with the Director beginning on May 22, or May 23, 1917, an agreement was reached with respect to the matter of ascertaining the cost of acquiring lands by purchase or condemnation identical with or substantially identical with that finally employed in the stipulation which has been filed in this case (our Abstract, pp. 969-970), as follows, to-wit:

"Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods: first, by taking each individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or

multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

"It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not to be resorted to if the second method can be made available.

"It is, therefore, understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such multiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and introduce testimony in modification
86 of the same which it has to any other fact stated in the Tentative Valuation.

"If, in the opinion of the Commission, it transpires, at any state of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

In reliance upon the agreement then reached, we regarded it as wholly unnecessary and consequently as involving an unnecessary expense to proceed further with the preparation of testimony of any character relating to this question. The whole matter was allowed to rest until the service upon the company of notice on August 29th, 1918, that the stipulation in certain respects was not approved by the Commission and that a hearing would be held at Kansas City September 9, 1918, for the purpose of giving the Carrier an opportunity to offer evidence on all questions left open by the stipulation and affected by the Commission's failure to adopt the same.

At the time of the service upon the Carrier of this notice of hearing for September 9, 1918, Mr. Moore having severed all connection with the Carrier and occupying the position of General Solicitor to the Federal Manager of the Carrier's properties, had likewise for the time being ceased to participate as a representative of the Carrier in this case. It was not until about September 7th, 1918, that he received notice that Judge Payne, at the request of the General Counsel of the Company, had assented to his further participation
87 in the case as counsel for the Carrier.

Mr. Souby, who was still representing the Carrier in the case, was absent from the city and had no knowledge of the hearing until his return on September 3, 1918. Shortly after his return and some three or four days prior to the date fixed for the hearing, he held a conference with the Valuation Attorney, Mr. C. F. Newman, with respect to the character of evidence which he intended to offer on behalf of the Carrier. When the matter of testimony with respect to the question of the cost of acquiring lands at date of valua-

tion by purchase or condemnation was discussed, Mr. Newman stated that it was his intention to object to the introduction of any such evidence because as he understood the effect of the Commission's decision in the Texas Midland case, such evidence would not be considered by the Commission. Mr. Souby, feeling confident that such an objection made by the representatives of the Bureau of Valuation would in all probability be sustained by the Examiner, decided that it would be fully sufficient for the protection of the Carrier to make an offer of same with respect only to Jackson County, and the record of the hearing shows that such was done. The action of the Examiner in sustaining the objection to this character of testimony was in effect overruled by the Commission when it set the case for hearing on October 7, 1918, for the sole purpose of taking evidence with respect to this question. The notice of the last mentioned hearing was received by the Carrier's representatives at Kansas City on Friday, October 4th, 1918, but one week day intervening between the date of the notice and the date fixed for the hearing.

88 If it had appeared at the time of the receipt by Mr. Souby of the notice of the hearing fixed for September 9th, 1918, that testimony of the character here under consideration would be received by the Examiner, there would have been time intervening between such date and the date of the hearing and the time which would be consumed in introducing the testimony which the Carrier was already prepared to offer, to enable it to make a beginning in the preparation of testimony with respect to the cost of acquiring its lands south of Jackson County, Missouri, although such testimony would of necessity have been hastily prepared and therefore not entirely satisfactory. There was not time, however, after receipt of notice of hearing set for October 7, 1918, to make any sort of preparation for such testimony and have it available for introduction in evidence at the hearing fixed for that date, and accordingly we did not undertake to have such appraisement started, but undertook instead to secure some agreement with the representatives of the Bureau of Valuation and with the Commission which would enable us to secure and offer same.

The notice that hearing would be had at Kansas City on October 7, 1918, was received in the form of a telegram from Commissioner B. H. Meyer, addressed to Mr. Souby, dated October 3rd and received here October 4th. On October 5th the following telegram, signed by Mr. Souby, was sent to Commissioner Meyer:

"Your telegram third instant re Kansas City Southern Valuation. When testimony was taken here Sept. ninth there was an advance understanding that our evidence as to cost of acquisition of lands would be excluded in view of Commission's ruling in Texas Midland

89 case and that our contention would be preserved by offers of testimony, and this was done. Stop. Legal evidence of the cost of acquisition by purchase or condemnation should I suppose in the absence of some agreement to the contrary, be directed to each parcel or tract of land and this data we had assembled for Kansas City and Jackson County when the stipulation pages nine sixty nine and nine seventy of our abstract was made

which rendered unnecessary the assembling of similar data at other points on the line. We are prepared to introduce all the testimony that we have at the hearing beginning here next Monday, but it is utterly impossible to secure similar data on some seven hundred miles south of Jackson county in time for hearing now set for October seventeenth. Will not the Commission in view of this situation consent that outside of Kansas City and Jackson County we may introduce testimony showing cost of acquisition by the percentages or multiples over normal land values, without making a separate problem of each tract or parcel."

On October 7th the taking of testimony began before Examiner Kimball at Kansas City and we proceeded to introduce our testimony with respect to the cost of acquisition by purchase or condemnation of the lands of the Carrier at valuation date in Jackson County, Missouri, including Kansas City, which, as above stated, had been previously prepared. We frankly stated to the Examiner and to Mr. Benton and Mr. Newman, counsel for the Bureau of Valuation, that we were not prepared to introduce testimony except as to Jackson County, Missouri, for the reason, as above stated, that the necessary data had not been assembled and the witnesses had not been qualified, because reliance had been placed upon the stipulation.

90 No answer having been received from Commissioner Meyer to our telegram of October 5, 1918, we had a conference with Messrs. Kimball, Benton and Newman on October 8th, giving them a copy of our telegram to Commissioner Meyer of October 5th above quoted, and we suggested that arrangement be made by which time might be given us within which to qualify our witnesses upon the subject of the cost of acquisition of the Carrier's lands by purchase or condemnation, south of Jackson County, Missouri. After a full discussion of the matter, the gentlemen named, on October 8th, sent the following telegram to Commissioner Meyer:

"Situation is that Carrier is now introducing evidence in tabular form showing original cost and value at time of acquisition of all lands Jackson County including Kansas City. Carrier not in position to introduce like testimony for balance of line but if we proceed now must introduce oral evidence showing value at time of acquisition for each parcel of entire line (which will perhaps take two or three weeks) Souby proposes to adjourn hearing submitting whole matter to Commission on seventeenth Period. If Commission decides to take further testimony Carrier will at subsequent date be prepared to introduce it in tabular form for any or all counties.

Souby ready to make agreement as follows which Benton and Newman recommend.

Evidence Kansas City and Jackson County to be taken Carrier claims evidence typical in principle of all counties Bureau does not admit it is typical and reserves right on order of Commission to take evidence covering counties claimed to be typical Case to be argued seventeenth before Commission all questions Period. After argument Commission to decide before report whether evidence covering any or all other counties shall be taken Carrier agrees that if

91 Commission determines to apply multiple comma the multiple two may be applied outside cities in all other counties without taking further evidence except as Commission may take typical counties upon request Bureau Period. If evidence taken after argument neither party to claim oral argument before Commission but may file brief or make oral argument before Examiner Thereupon Commission may render decision upon all issues raised by protest period. Souby's agreement is subject to approval Untermyer now requested by wire Untermyer to advise Commission direct."

The foregoing telegram came to our notice October 9th, and a telegram was immediately sent to Samuel Untermyer, General Counsel of the company at New York City, asking for authority to join in proposed agreement. The requested authority was duly received, and accordingly a telegram to that effect was sent to Commissioner Meyer on October 9th, as follows:

"Suggestion wired you yesterday by Kimball, Benton and Newman is satisfactory to Mr. Untermyer, Souby and myself, with understanding that if Commission determines to ascertain and report cost of acquisition of lands by purchase or condemnation such data shall be ascertained for entire line by taking of testimony or agreement upon multiple."

No reply to either telegrams has been received from Commissioner Meyer.

When we had concluded the introduction of testimony as to Jackson County, on October 10th, 1918, as aforesaid, we asked the Examiner to adjourn the hearing until witnesses could be prepared to testify as to lands south of Jackson County. There was an

92 extended conference upon this subject. We explained at length that the testimony was not then available, for reasons heretofore stated, but that we would proceed with all speed to make it presently available. We produced before the Examiner Mr. J. L. Faris, who, with Mr. Edwin (who was likewise in the city and available) were familiar with the lands of the Carrier covering its entire line from Jackson County south to the Gulf, having made a joint appraisement of said lands with Mr. Minor, representing the Bureau of Valuation. Mr. Faris stated that he was prepared to leave Kansas City at once and make the necessary examination of lands in Cass County, Missouri, and return the following Monday, October 14th, and testify in reference thereto, returning immediately to qualify himself to testify with reference to the lands in the next county south and so on, and we offered to send out Mr. Edwin immediately, so that he could likewise qualify himself and return to Kansas City to give his testimony, so that the taking of testimony beginning October 14th might proceed continuously until completed, except for the time during which Mr. Souby and Mr. Moore would necessarily be absent in Washington to attend the argument of the case set for October 17th. The Examiner refused to permit any continuance or adjournment whatsoever, or to afford us any opportunity whatsoever to produce our testimony, and closed the hearing against our strong protest.

On the same day, October 10th, we sent the following telegram to Commissioner Meyer:

"Kansas City Southern Valuation. We have completed today all testimony now available, which includes cost of acquisition by purchase or condemnation of lands in Jackson County, Mo., in-
93 cluding Kansas City. We did not assemble data and qualify witnesses to give similar testimony outside of Jackson County because we relied on the stipulation set forth in our abstract pages nine sixty nine and nine seventy. We can make a beginning on this testimony next Monday, continuing until same is completed, except during period when we are necessarily absent to attend Washington hearing now set for October 17th. Examiner Kimball acting on instructions declines to adjourn hearing until next Monday so this program may be carried out. We should be permitted to introduce this testimony. The delay is no fault of ours. Will not Commission authorize examiner to hear it? Will greatly appreciate telegraphic reply."

On October 12th the following telegram was received from Commissioner Meyer, which was the only direct answer to our telegrams above quoted:

"Instructions have been wired to the examiner."

We immediately called up Mr. Newman, Valuation Attorney, to find out the meaning of the telegram, and he explained that instructions had been received to read into the record Mr. Untermyer's motion for the taking of testimony, which, as Mr. Newman advised me, had already been done. He also stated that the examiner had left Kansas City before the telegram had been received.

S. W. MOORE.
J. M. SOUBY.

Subscribed and sworn to before me this 17th day of October, 1918.

ALFRED HOLMEAD,
Notary Public.

94 Supreme Court of the District of Columbia.

At Law. 61/917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Order.

Upon the annexed petition of Kansas City Southern Railway Company, verified by its secretary, G. C. Hand, on the 3rd day of December, 1918,

It is ordered that the above-named respondent, Interstate Commerce Commission of the United States, show cause at a session of

this Court, to be held in the court house of the Supreme Court of the District of Columbia in the City of Washington, on the 10th day of December, 1918, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein granting a peremptory writ of mandamus requiring the respondent to investigate, take and receive testimony, including such competent proof that relator may offer, and ascertain, find and report in detail the present cost of condemnation and damages or of
95 purchase in excess of original cost or present value of lands owned or used by relator, in conformity with the provisions of the Act of Congress of March 1, 1913.

And respondent is further required to show cause at said time and place why, in case this Court shall refuse such peremptory writ, an order should not be granted directing that an alternative writ issue requiring and directing said respondent to perform the aforesaid acts in compliance with said Act of Congress, or to show cause before this Court, at such time as may be fixed by this Court, why a peremptory writ of mandamus should not issue to that effect.

Sufficient reason appearing therefor, let service of this order and the papers upon which it is granted, on the respondent, on or before the 6th day of December, 1918, be deemed sufficient.

Dated, Washington, D. C., December 5th, 1918.

WALTER I. McCOY,
Chief Justice of the Supreme Court of the District of Columbia.

96-282 Filed Dec. 24, 1918.

(Copy.)

In the Supreme Court of the District of Columbia.

No. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Answer of Interstate Commerce Commission to Amended Petition.

Respondent hereby makes its answer to the original petition its answer to the amended petition, in the above-entitled proceeding.

For the convenience of the Court and of counsel, respondent attaches hereto, marked Exhibit A, a copy of respondent's decision in the Texas Midland Railroad Valuation Case 1 I. C. C. Val. Rep. 1, and calls particular attention to pages 52 to 62, inclusive, and pages

168 to 172, inclusive, thereof, where the subject matter involved in this proceeding is discussed.

P. J. FARRELL,
For Respondent.

December 24, 1918.

* * * * * * *

283 Filed January 2, 1919.

Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Demurrer to Answer.

Comes now the relator, The Kansas City Southern Railway Company and demurs to the answer of the respondent, and says that the same is not good in law, because:

I. The Act of March 1, 1913, imposes upon the respondent the plain ministerial duty to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by the relator.

II. The said Act imposes upon the respondent the plain ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by the relator for the purpose of establishing such present cost of condemnation or purchase.

284 III. The answer of respondent fails to set forth any legal excuse for failing to perform said ministerial duties.

Wherefore, relator prays that this Court let its writ of mandamus go as prayed in the petition.

Respectfully submitted.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By SAMUEL UNTERMYER,
JESSE C. ADKINS,
Its Attorneys, 705 Wilkins Building, Washington, D. C.

F. M. S.

285 Supreme Court of the District of Columbia.

Thursday, March 6, 1919.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

This cause came on to be heard upon the petition, the rule to show cause and answer thereto, the amended petition and demurrer to said answer and after argument thereon by counsel of record for the respective parties, was submitted to the Court. Upon consideration whereof, it is this 6th day of March, A. D., 1919, ordered that said demurrer be, and the same is hereby overruled. Thereupon, petitioner elects to stand upon said demurrer; whereupon it is considered that said rule to show cause be, and the same is hereby discharged, the petition dismissed and that respondent recover of the petitioner his costs of defense to be taxed by the Clerk and have execution thereof.

From the foregoing judgment the petitioner by its attorney of record, Mr. Frank M. Swacker, in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars ($100.00), with leave to deposit the sum of Fifty Dollars ($50.00) with the Clerk in lieu thereof.

Memorandum.

March 6, 1919.—$50 deposited with Clerk in lieu of appeal bond.

286 Filed March 6, 1919.

In the Supreme Court of the District of Columbia.

At Law.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Assignments of Error.

The Court below erred as follows:

1. In overruling the demurrer to the answer.

2. In declining to issue the writ of mandamus as prayed in the petition.

3. In not holding *the* the Act of March 1, 1913, known as the Valuation Act imposes upon the respondent the plain ministerial duty to

investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by the relator.

4. In not holding that the said Act imposes upon the respondent the plain ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by the relator for the purpose of establishing such present cost of condemnation or purchase.

FRANK. M. SWACKER,
Attorney for Petitioner.

287 Filed March 6, 1919.

In the Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Designation for Record.

To the Clerk of the Court:

You will please prepare the transcript for the Court of Appeals and include therein the following:

1. Original petition.
2. Amended petition.
3. Rule to show cause.
4. Answer to the original petition.
5. Answer to the amended petition.
6. Demurrer.
7. Order overruling the demurrer and entering final judgment and notice of appeal.
8. Notice that deposit for costs has been made.
9. Assignments of error.
10. This order.

FRANK M. SWACKER,
Attorney for Petitioner.

288 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 287, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 61917 at Law, wherein United States of America, at the relation of Kansas City Southern Railway Company, is Relator and Interstate Commerce Commission of the United States is Respondent, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of March, 1919.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Associated Clerk.

289 In the Court of Appeals of the District of Columbia.

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,
against
INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Stipulation.

It is hereby stipulated by the attorneys of record for the parties in the above-entitled proceeding that the clerk of the Court of Appeals shall cause to be printed the entire record except Exhibit A of respondent's answer to amended petition, being pages 97 to 281 inclusive of the record herein (said Exhibit A being report of the Interstate Commerce Commission in the matter of the valuation of the Texas Midland Railway Company, 1 I. C. C. Valuation Report 1).

FRANK M. SWACKER,
Attorney for Appellant.
P. J. FARRELL,
Attorney for Appellee.

Washington, D. C. March 7, 1919.

[Endorsed:] No. 3255. U. S. ex rel. Kansas City Southern Railway Co., Appellant, v. Interstate Commerce Commission. Stipulation as to Printing Record. Court of Appeals District of Columbia. Filed Mar. 7, 1919. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3255. United States of America at the relation of Kansas City Southern Railway Company, appellant, vs. Interstate Commerce Commission of the United States. Court of Appeals, District of Columbia. Filed Mar. 6, 1919. Henry W. Hodges, clerk.

April Term, 1919.

TUESDAY, May 6th, A. D. 1919.

* * * * * * *

No. 3255.

U. S. ex Rel. KANSAS CITY SOUTHERN RAILWAY CO., Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

It is stipulated that the above entitled cause may be heard and determined by the Chief Justice and Mr. Justice Robb, in the absence of Mr. Justice Van Orsdel.

Samuel Untermyer, F. M. Swacker, S. W. Moore, Counsel for Appellant.

P. J. Farrell, Counsel for Appellee.

(Endorsed:) No. 3255. Stipulation of Counsel. Court of Appeals, District of Columbia. Filed May 6, 1919. Henry W. Hodges, Clerk.

TUESDAY, May 6th, A. D. 1919.

* * * * * * *

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

On motion, the appellant is allowed to file a supplemental brief herein.

The argument in the above entitled cause was commenced by Mr. S. W. Moore, attorney for the appellant, and was concluded by Mr. P. J. Farrell, attorney for the appellee.

April Term, 1919.

MONDAY, June 2nd, A. D. 1919.

* * * * * * *

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, the Court being equally divided in opinion, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. CHIEF JUSTICE SMYTH.

June 2, 1919.

Mr. Justice Van Orsdel did not sit or take any part in this decision.

In the Court of Appeals of the District of Columbia.

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Appellee.

Now comes the appellant Kansas City Southern Railway Company and moves the Court for a writ of error to remove the above-entitled cause to the Supreme Court of the United States, and that the amount of bond for costs be fixed.

FRANK M. SWACKER,
Attorney for Appellant.

(Endorsed:) No. 3255. United States of America at the Relation of Kansas City Southern Railway Company, Appellant, against Interstate Commerce Commission of the United States. Motion for writ of error. Court of Appeals, District of Columbia. Filed Jun- 3, 1919. Henry W. Hodges, Clerk.

WEDNESDAY, June 4th, A. D. 1919.

* * * * * * *

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said writ issue as prayed, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before

you, or some of you, between United States of America at the Relation of Kansas City Southern Railway Company, Appellant, and Interstate Commerce Commission of the United States, Appellee, a manifest error hath happened, to the great damage of the said Appellant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 4th day of June, in the year of our Lord one thousand nine hundred and nineteen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

—— ——.

In the Supreme Court of the United States.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff-in-Error,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Defendant-in-Error.

Assignment of Errors.

In Error to the Court of Appeals of the District of Columbia.

Comes now the plaintiff-in-error in the above-entitled cause, by Frank M. Swacker, its attorney, and says that, in the record, proceedings, decision and final judgment of the Court of Appeals of the District of Columbia, in the above-entitled cause, which was instituted by the plaintiff-in-error in the Supreme Court of the District of Columbia and brought by it to the said Court of Appeals by appeal, there is manifest error to the prejudice of this plaintiff-in-error in this, to wit:

First. That the said Court of Appeals erred in entering judgment affirming the judgment of the Supreme Court of the District of

Columbia and in effect sustaining its order dismissing with costs the petition of plaintiff-in-error for a writ of mandamus to the said Interstate Commerce Commission to require it to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by plaintiff-in-error, as required by the Act of Congress of March 1, 1913, imposing said duty upon defendant-in-error.

Second. Said Court of Appeals erred in sustaining the Supreme Court of the District of Columbia in overruling the demurrer of the relator to the answer of the respondent to the petition of relator praying said court to issue its writ of mandamus to respondent to require it to comply with the provisions of said Act of Congress March 1, 1913, commonly known as the Valuation Act.

Third. That said Court of Appeals erred in construing said Act of Congress of March 1, 1913, known as the Valuation Act, in failing to find that said Act imposed upon defendant-in-error the ministerial duty to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by plaintiff-in-error.

Fourth. That said Court of Appeals erred in construing said Act of March 1, 1913, known as the Valuation Act, in failing to find that said Act imposes upon the defendant-in-error the ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by plaintiff-in-error for the purpose of establishing such present cost of condemnation or purchase.

Fifth. That said Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia and directing it to issue its writ of mandamus as prayed in the petition.

Wherefore, for these and other manifest errors appearing in the record, the plaintiff-in-error prays that the judgment of the Court of Appeals of the District of Columbia be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff-in-error herein directing the Supreme Court of the District of Columbia to issue its writ of mandamus as prayed in the petition of relator in said Court.

FRANK M. SWACKER,
Attorney for Plaintiff-in-Error,
Wilkins Building, Washington, D. C.

Dated Washington, D. C., June 9, 1919.

(Endorsed:) United States of America at the relation of Kansas City Southern Railway Company, Plaintiff-in-Error, against Interstate Commerce Commission of the United States, Defendant-in-Error. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jun- 12, 1919. Henry W. Hodges, Clerk.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Kansas City Southern Railway Company, as principal, and Royal Indemnity Company, a corporation of the State of New York, with Head Office at #84 William St., New York City, N. Y., as surety, are held and firmly bound unto Interstate Commerce Commission of the United States in the full and just sum of three hundred — to be paid to the said Interstate Commerce Commission or its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, jointly and severally, by these presents. Sealed with our seals and dated this Eleventh day of June, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between United States of America, at the relation of Kansas City Southern Railway Company, Appellant, against Interstate Commerce Commission of the United States, Appellee, a judgment was rendered against the said Kansas City Southern Railway Company, and the said appellant, Kansas City Southern Railway Company, having obtained a writ of error, and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Interstate Commerce Commission, appellee, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said appellant shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE KANSAS CITY SOUTHERN RAILWAY CO.,
By G. C. HAND,
Vice President.

[SEAL OF K. C. S. R. CO.]

ROYAL INDEMNITY COMPANY,
By JOHN F. A. BECKER,
Attorney-in-Fact.

[SEAL OF ROYAL INDEMNITY COMPANY.]

Approved by—
C. J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3255. U. S. ex rel. Kansas City Southern Railway Co., Appellant, vs. Interstate Commerce Commission of the United States. Bond on Writ of Error. Court of Appeals, District of Columbia. Filed Jun- 12, 1919. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the Interstate Commerce Commission of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein United States of America at the relation of Kansas City Southern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of June, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged June 13, 1919.
P. J. FARRELL,
Counsel for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-13, 1919. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 69 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of the United States of America at the relation of Kansas City Southern Railway Company, Appellant, vs. Interstate Commerce Commission of the United States, No. 3255, April Term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 13th day of June, A. D. 1919.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 27,168. District of Columbia Court of Appeals. Term No. 413. The United States of America at the relation of Kansas City Southern Railway Company, plaintiff in error, vs. Interstate Commerce Commission. Filed June 16th, 1919. File No. 27,168.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, AT THE relation of Kansas City Southern Railway Company, Plaintiff in Error, *v.* INTERSTATE COMMERCE COMMISSION. } No. 413.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance this case for argument on an early day of the present term convenient to the court.

This is a suit by the relator, Kansas City Southern Railway Company, for a writ of mandamus to compel the Interstate Commerce Commission to receive certain evidence which it has refused to receive in a proceeding now pending before it, entitled *In the Matter of the Valuation of the Property of the Kansas City Southern Railway Company et al.*

By the act of March 1, 1913 (37 Stat. 701), commonly known as the railroad-valuation act, the Interstate Commerce Commission is required, among

other things, to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the act to regulate commerce. Paragraph second of said act reads as follows:

> Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier and ascertained as of the time of dedication to public use and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

The Kansas City Southern Company applied for and received permission from the commission to introduce in the before-mentioned proceeding certain evidence which it was claimed would establish the present cost of condemnation and damages or of purchase of the lands included in the rights of way, yards, and terminals of the railroad dedicated to the public use.

At the hearing before an examiner of the commission the relator introduced such evidence to the extent that it was prepared to do so. Thereafter relator requested permission to introduce additional evidence of the same character, and this request was denied by the commission for the reasons stated in its decision in the *Texas Midland Case* (1 I. C. C. Val. Rep. 1), whereupon relator brought this suit for a mandamus.

The commission states that it has not undertaken to take evidence relative to ascertaining the "present cost of condemnation and damages or of purchase in excess of original cost or present value" of railroad properties, for the reason that, as pointed out by this court in the *Minnesota Rate Case* (230 U. S. 352), there is no lawful or reasonable basis upon which to rest such an estimate, except that it has permitted relator and other carriers to introduce evidence showing the impossibility of complying with this requirement of the valuation act.

The question involved in this case is one arising in a large number of similar cases now pending before the commission. It is therefore a case of general public importance, and it is believed that the question involved should be settled as promptly as possible.

Opposing counsel concur.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

○

FILED
NOV 25 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM—1919.

No. 413.

THE UNITED STATES OF AMERICA on the relation of Kansas City Southern Railway Company,

Plaintiff-in-Error,

vs.

INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF-IN-ERROR.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
SAMUEL W. MOORE,
of Counsel.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 413.

THE UNITED STATES OF AMERICA, at the relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Plaintiff-in-Error,

vs.

THE INTERSTATE COMMERCE COMMISSION.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement.

The question involved in this record does not grow out of disputed facts, but is wholly one of law, and may be stated briefly as follows:

Can the Interstate Commerce Commission be required by mandamus to investigate and report the "present cost of condemnation and damages or of purchase" of the "lands right of way and terminals owned and used for the purposes of a common carrier," as required by the Valuation Act of March 1st, 1913, and to admit competent testimony offered

by the carrier to establish these facts, where in proceedings instituted under that Act the Commission refused to do so?

The plaintiff in error (herein referred to as the plaintiff) filed its petition for mandamus against the Commission in the Supreme Court of the District of Columbia on December 5th, 1918 (Rec., page 1), to require the Commission to ascertain the "present cost of condemnation and damages or of purchase" of its carrier lands, and to admit competent evidence in support of that issue. The plaintiff demurred (Rec., page 55), to the Commission's answer (Rec., pages 25, 54), to the amended petition (Rec., page 30).

Judgment was rendered by the Court of first instance in favor of the defendant, without a written opinion, on March 6th, 1919 (Rec., page 56). An appeal was prosecuted to the Court of Appeals of the District of Columbia, where the cause was argued on May 6th, 1919 (Rec., page 59), before two judges of that court, the third judge being absent. On June 2nd, 1919, the court being equally divided, the judgment of the lower court was affirmed without a written opinion.

The case comes here on writ of error. The solution of the question involved depends on these facts:

The Act of Congress of March 1st, 1913, commonly called the Valuation Act (herein set forth as Appendix A), provides by Section 19a, that the Interstate Commerce Commission shall investigate and report the final value of all the property owned or used by every common carrier subject to the provisions of the "Act to Regulate Commerce." It is also required to ascertain and report in detail, as to every piece of property owned or used by

each common carrier many other things, including (a) the original cost to date, (b) the cost of reproduction new, (c) the cost of reproduction less depreciation, and (d) other values and elements of value, if any.

With respect to the Commission's special duty concerning rights of way and other lands, the provisions of Section 19a, of the Act are as follows:

> "SECOND.—Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, *and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.*"

After collecting the necessary data, the Commission is required to find and publish a tentative valuation of all the property owned or used by every common carrier, and thereupon the carrier is allowed thirty days within which to file its protest with the Commission, which it may support by the introduction of testimony. Provision is made therefor in the following terms:

> "If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relevant and material thereto which may be presented in support of any such protest so filed as aforesaid."

It is further provided that after hearing the protest, the Commission, if of the opinion that its tentative valuation should be modified, shall make such changes as may be necessary, and shall issue an order making the corrected tentative valuation final as of the date thereof. All final valuations by the Commission shall be *prima facie* evidence of the value of the property of each carrier in all proceedings under the "Act to Regulate Commerce," in all judicial proceedings for the enforcement of the Act to Regulate Commerce, and in all judicial proceedings to enjoin, set aside, annul or suspend in whole or in part any order of the Commission.

The Commission began its investigation of the value of the plaintiff's property in 1914, and in November, 1916, published and served upon the plaintiff its tentative valuation.

Neither in the tentative valuation nor in the investigation which preceded it, did the Commission make any investigation or report whatsoever as to the "present cost of condemnation and damages or of purchase" of the plaintiff's lands (Amended Petition, Rec., page 31, Answer, Rec. page 26). In other words, the Commission has not found nor has it undertaken to find the cost of reproduction of the plaintiff's right of way and other lands, as required by the statute, or to comply with its explicit command. For reasons presently to be stated the Commission formally announced its refusal to conform with that portion of the Act above italicized, imposing the duty specified. The plaintiff duly filed with the Commission its protest complaining of this omission.

After admitting testimony offered by the plaintiff to establish the present cost of condemna-

tion and damages or of purchase of its properties in Jackson County, Missouri (which embraces Kansas City only), the Commission refused to admit the testimony offered by the plaintiff to show the cost of reproduction of its lands outside of that county, extending over the entire length of its system operated in Missouri, Kansas, Oklahoma, Arkansas, Louisiana and Texas, and comprising over 700 miles of right of way, besides terminals and other land used for the purposes of a common carrier (See Paragraphs, Fifth, Sixth, Seventh and Eighth of Amended Petition, Rec., pages 33, 34, and Answer, Rec., page26). The Commission's ruling is expressed in its resolution of November 15th, 1918, quoted in the Petition (Rec., page 24).

> "Voted that for the reasons stated in the report in the Texas Midland case, the motion of counsel for the Kansas City Southern Railway Company in the Kansas City Southern valuation case to take further testimony as to the present cost of condemnation and damages or acquisition of carrier lands of the petitioner be overruled, Chairman Daniels voting in the negative (Seventh Paragraph, Amended Petition, Rec., page 34 and Answer, Rec., page 26).

As set forth in this resolution, the sole reason assigned by the Commission for its refusal to find the cost of reproduction of the plaintiff's lands and to admit the plaintiff's testimony tending to prove that fact, is to be found in its decision theretofore rendered in the Valuation Case of the Texas Midland Railway Company. The Commission there says in substance (*I. C. C., Val. Rep.* 1, at pages

52, 62, 168, 172), that reproduction cost of land cannot be ascertained, and hence it is useless to admit testimony upon that issue. It bases this conclusion upon what we regard as an erroneous interpretation of the opinion in the *Minnesota Rate Cases*, 230 U. S., 352. It is to be noted that the Commission does not undertake to pass upon the weight or competency of the testimony offered by the plaintiff and admitted by it in relation to the cost of reproduction of the plaintiff's lands in Jackson County, Missouri, nor does it undertake to pass upon the competency or relevancy of any testimony which the plaintiff is prepared to offer in support of its contention touching the cost of reproducing its lands extending over 700 miles south of Jackson County, Missouri.

The Commission has found what it terms the "present value" of the plaintiff's lands. It defines what it means by this expression in the Texas Midland Case (1 Val. Rep., 53), as follows:

> "Present value is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

We strenuously insist that this so-called present value is not the present value of plaintiff's lands, but is nothing more than the average acreage value of adjoining lands. That is quite another thing, for it excludes the cost of condemnation and damages or of purchase in excess of the original cost constituting as they do essential elements of the

present value of the land of the carrier used for the purposes of such carrier.

The Commission accordingly found the so-called present value of the plaintiff's lands, as an entirety, to be approximately $5,000,000. It is charged in the Amended Petition, and not denied in the Answer, that the cost of acquisition of these same lands by purchase or condemnation as of valuation date, June 30, 1914, would exceed the so-called present value by the sum of $5,000,000, thus making the aggregate cost of reproduction approximately $10,000,000 (Rec. page 35).

Our contention is that the Valuation Act requires the Commission to ascertain and report these reproduction costs, to the end that the amount thereof may be before the Commission for its consideration when it later proceeds to place a final value upon all of the properties of the plaintiff.

It is also alleged in the Amended Petition, by way of illustration of the consequences resulting from the Commission's refusal to perform its duty under the Valuation Act, and it is not denied, that certain lands were acquired by the plaintiff for right-of-way shortly before the valuation date, through condemnation proceedings, at an actual cost of $180,000, and that the Commission has reported the so-called present value of these lands at $60,000 (Rec., pages 34,35). Our contention is that the larger sum represents the "cost of condemnation and damages or of purchase" of these lands and should be so reported by the Commission and made a part of plaintiff's land schedule.

Assignment of Errors.

I.

The Court of Appeals erred in entering judgment affirming the judgment of the Supreme Court of the District of Columbia, and in effect sustaining its order dismissing with costs the petition of plaintiff for a writ of mandamus to the Interstate Commerce Commission to require it to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights-of-way and terminals owned or used for the purposes of a common carrier by plaintiff, as required by the Act of Congress of March 1, 1913, imposing said duty upon said Commission.

II.

The Court of Appeals erred in sustaining the Supreme Court of the District of Columbia in overruling the demurrer of the plaintiff to the answer of the Interstate Commerce Commission to the petition of plaintiff praying said court to issue its writ of mandamus to said Commission to require it to comply with the provisions of said Act of Congress March 1, 1913, commonly known as the Valuation Act.

III.

The Court of Appeals erred in construing said Act of Congress of March 1, 1913, known as the Valuation Act, by failing to find that said Act im-

posed upon the Interstate Commerce Commission the ministerial duty to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by plaintiff.

IV.

The Court of Appeals erred in construing said Act of March 1, 1913, known as the Valuation Act, by failing to find that said Act imposes upon the Interstate Commerce Commission the ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by plaintiff for the purpose of establishing such present cost of condemnation or purchase.

V.

The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia and directing it to issue its writ of mandamus as prayed in the petition (Rec. pages 56, 57, 61, 62).

Brief.

I.

Where, as in this case, a plain duty is imposed upon the Interstate Commerce Commission and it declines to proceed with its performance, mandamus lies to require it to act.

It was not contended by the Commission in either of the courts below that mandamus is not a proper remedy for the relief sought by the Amended Petition.

The authorities establish not only the appropriateness, but also the necessity of that remedy.

Interstate Commerce Commission vs. *United States ex rel Humboldt Steamship Company*, 224 U. S., 474.
Lane vs. *Hogland*, 224 U. S., 174.
In re Simons, 247 U. S., 231.
United States, ex rel Louisville Cement Company vs. *Interstate Commerce Commission*, 246 U. S., 637.
Ex parte Metropolitan Water Company, 220 U. S., 539.
Ex parte United States, 242 U. S., 227.
Ex parte Connaway, 178 U. S., 421.
Ketchum Coal Company vs. *District Court*, 159 Pac., 737, 26 Cyc., 190.

In Interstate Commerce Commission vs. *Humboldt Steamship Co., supra*, the case was brought here on a writ of error to the Court of Appeals of the District of Columbia. The steamship company

had instituted an action in the Supreme Court of the District of Columbia praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the Interstate Commerce Act with respect to the filing with the Commission of schedules showing the rates and charges for transportation of passengers and property of various common carriers between points in Alaska and points in the Dominion of Canada and other places and other matters. The Supreme Court of the District of Columbia, although holding that the Commission had ample authority to assume jurisdiction over common carriers in Alaska, nevertheless decided that it had no power to require the Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the Court would reach. The Court of Appeals took a different view of the power of the courts to compel action and reversed the judgment of the Supreme Court, and remanded the cause with directions to issue a peremptory writ of mandamus as prayed for. This Court affirmed such action. In the course of his opinion Mr. Justice McKenna said:

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there

may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding,* 219 U. S., 263. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined and, in the main, explicity directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed? The answer of the Commission is, by 'a reversal by the tribunal of appeal.' And such a tribunal, it is intimated, is the United States Commerce Court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an applicant was not entitled to relief. * * *

> In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to do so as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the Court of Appeals, the order of the Court being that a peremptory writ of mandamus be issued directing the Commission 'to take jurisdiction of said cause and proceed therein as by law required.' In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was 'constrained to hold,' as it said, 'upon authority of the decision recently announced in, *In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska,* 19 I. C. C. Rep., 81, that the Commission is without jurisdiction to make the order sought by complainant,' the steamship company."

Lane vs. *Hoglund, supra,* was also brought to this Court on a writ of error to the Court of Appeals of the District of Columbia. A writ of mandamus was refused by the Court of first instance, but was directed to be granted by the Court of Appeals. The construction of a statute of the United States was involved and the duty of the Secretary of the Interior thereunder was drawn in question. Sustaining the right to award the writ, Mr. Justice Van Devanter in his opinion quoted what was said in *Roberts* vs. *United States,* 176 U. S., 221:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even

where a public office is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the Court would on that account be powerless to give relief. Such a limitation of the powers of the Court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter

how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

Here mandamus is the only remedy. From the refusal of the Commission to receive relevant testimony and to decline to perform its statutory obligation, there is no appeal; nor is there any right of appeal from the failure of the Commission to find the reproduction cost of the plaintiff's lands. The law provides no method for review of the action of the Commissioner in this regard.

It is true that the Valuation Act contains the following provision:

"If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the Court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the Court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the Court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said Court within the time fixed by the Court. If the Commission shall alter,

modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order."

It is apparent from this clause that the Commission's determination of the law as well as the findings of fact are final and beyond the power of any court to alter, amend or modify. The sole function conferred on a court in the distant and remote eventuality that the final value as determined by the Commissions is sought to be used on the trial of an action involving such final value as fixed is that of hearing testimony different from that originally heard by the Commission or additional thereto and substantially affecting its value. But even in that event, the Court does not itself reverse the action of the Commission or render judgment or declare the law or define how value shall be determined nor is it otherwise permitted to interfere with the exclusive function of the Commission to fix and determine final value. The new evidence goes to the Commission without any instruction whatsoever from the court. The Commission merely hears the new evidence and again exercises its own judgment in determining the value, weight and consideration to be given to it. In other words, valuation begins with the Commission and ends with it. Its own views both as to law and the fact are a finality.

That this is the true construction of the paragraph in question not only appears from its plain language, but was so understood by the Senate Committee on Interstate Commerce as shown by the report recommending the passage of the Valuation Act (Report 1290, 62nd Congress, 3rd Session). In recommending the addition of this paragraph by amendment, to the House bill, it said:

> "Up to 1906 the Commission had sustained 32 reversals in the Supreme Court. In 26 of those cases the record discloses that the orders of the Commission were reversed, because testimony was offered upon the trial before the Court which was not offered when the case was presented to the Commission.
>
> The purpose of this amendment is to give the Commission the benefit of any testimony which may be offered as to the valuation, which was not presented to the Commission on its hearing of the proceeding. If the Commission finds the new testimony material and important, it is afforded opportunity to modify its order in the proceeding. Such modification of the order may lead to withdrawal of the appeal or to confirmation of the order by the Court. In any event, it is fair to the Commission and to the public, imposes no hardship upon the parties, and may work a great saving of time and expense incident to reversal and retrial."

It may be contended by the Commission, however, that our construction of the provision of the Act in question is not the correct one. Let us assume, as seems to be done by respondent in its an-

swer (Rec., page 27), that the Act does not deprive the Court in the case contemplated, of the power to review the valuation finally fixed by the Commission. The right of review so granted still lacks much of being such an adequate remedy as bars relief by mandamus. The remedy suggested is neither equally direct, convenient, beneficial nor effectual as mandamus. The statute, so construed, affords no method by which a carrier, conceiving itself aggrieved by the valuation placed upon its property, may, of its own initiative, secure a judicial review thereof. It can neither appeal from the decision of the Commission nor prosecute a writ of error thereto, nor can it of its own motion initiate a direct proceeding for the review of an order fixing a final valuation.

It will not do to say that the Act, so construed, affords a remedy as soon as occasion therefor arises, because the carrier might suffer incalculable injury from an unduly low valuation of its property years before any case such as is contemplated by the Act may arise in the courts. The plaintiff would be forced to abide the time, however remote when in some judicial proceeding, the valuation made by the Commission is sought to be used against the carrier, although, in the meantime, on stock exchanges, in its financial transactions, in procedings before administrative bodies and commissions, as well as in both national and state legislation, such valuation may be daily urged to its injury. Adequacy cannot be predicated of a remedy which cannot be invoked at the will of the injured party.

The fact that there is no other remedy available to the plaintiff justifies its right to seek relief by mandamus, as is shown by the following decisions:

Ex parte Harding, 219 U. S., 363;
Ex parte Hoard, 105 U. S., 578;
Ex parte Park Square Automobile Station, 244 U. S., 412;
Ex parte Roe, 230 U. S., 70;
Ex parte Slater, 246 U. S., 128.

The Commission, whilst not denying that a ministerial duty has been imposed upon it by statute which it has refused to perform, pleads the impossibility of complying with the terms of the statute as an excuse for non-performance. The basis for this contention is the interpretation that it has given to the decision of this Court in the *Minnesota Rate Cases,* 230 U. S., 352 (Answer, Rec. page 26).

II.

The action of the Interstate Commerce Commission in deliberately disregarding the mandate of Congress which required the Commission, in express terms, to investigate and report "separately the original and present cost of condemnation and damages or of purchase in excess of the original cost or present value" of all lands, rights of way and terminals owned or used for the purposes of a common carrier, offends the fundamental canons of statutory construction.

The Commission has frankly avowed its determination not to receive or consider the testimony

offered by the plaintiff in error, as to the present cost of condemnation and damages or acquisition of carrier lands. It plants its decision on the reasons stated in its report in the *Texas Midland Railroad Company Case.* Those reasons are, in short, that the requirements of the statute are to be ignored because impossible of performance.

It is not claimed by the Commission that the act is unconstitutional. It is not pretended that its language is ambiguous, meaningless, or unintelligible. The Commission has not undertaken to interpret, but to nullify, congressional action. The command of the legislative branch of the Government, addressed to a ministerial body, requiring definite action, is set aside by the very agency created by Congress and charged by it with the duty of making the investigation and report, thus refused to be made. The Commission has, for all practical effect, drawn its pen through the statute designed to define its duties with respect to the valuation of the property of carriers, and has, by its action, declared that it will not do what the Congress of the United States has made it its duty to do.

This presents a situation so startling and extraordinary as to make it necesary, for fear that some underlying principle of law may have been overlooked, to test the accuracy of one's impressions regarding the omnipotence of Congress, which except as controlled by the Constitution, has hitherto been regarded as unquestioned. We know that the Congress is superior in power and authority to the agencies that it creates, and that there is an absolute presumption that it will do no wrong and pass no unjust or ill-considered laws. We also know that what is or is not public policy is ul-

timately to be determined by it, and that when a statute which it has duly enacted declares what the public policy is, as to matters to which the act relates, it must be enforced and cannot be annulled either by the judicial or the executive departments of the Government.

Lewis' Sutherland's Statutory Construction, §85.

We further know that unless a statute violates some express provision of the Constitution it must be held to be valid and must be carried out in accordance with its terms.

Cope vs. *Cope,* 137 U. S., 682, 685.
Dewey vs. *United States,* 178 U. S., 510, 521.

We likewise know that it is an elementary principle, based on the soundest of reasons, that every word and phrase of a statute must be given effect, rather than that part should be expunged and perish by construction.

As was said by Mr. Justice Strong in *Market Co.* vs. *Hoffman,* 101 U. S., 115:

> "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in *Bacon's Abridgement,* §2, it was said that 'a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times."

This language was cited with approval and applied in *United States* vs. *Lexington Mill and Elevator Co.,* 232 U. S., 399. The question considered was the interpretation of a provision in the Food and Drugs Act dealing with the subject of the adulteration of food. It provided that, food shall be deemed adulterated "if it contain and added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" On the trial of a libel filed for the condemnation of flour claimed to have been adulterated, the instruction of the Court permitted the statute to be read without the final and qualifying words concerning the effect of the article upon health. Mr. Justice Day said:

> "If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent."

In *Palmer* vs. *Van Santvoord,* 153 N. Y., 612, 616, Chief Judge Andrews said:

> "Words are not to be rejected as superfluous when it is practicable to give to each a distinct and consistent meaning. 'The good expositor,' says Lord Coke, 'makes every sentence have its operation to suppress all the mischiefs; he gives effect to every word of the statute; he does not construe it so that anything should be vain and superfluous, nor yet make exposi-

tion against express words, but so expounds it that one part may stand agreeable with the other and all may stand together.' (*Coke's Rep., part VIII, page* 310.)"

Among the many cases in which this doctrine has been applied are:

United States vs. *Gooding,* 12 Wheat., 460;
Early vs. *Doe,* 16 How., 616;
Rice vs. *Minnesota & N. W. R. R. Co.,* 1 Black, 379;
Platt vs. *Union Pacific R. R. Co.,* 99 U. S., 59.
United States vs. *Fisher,* 109 U. S., 143;
Knight vs. *U. S. Land Assn.,* 142 U. S., 161, 177.
Petri vs. *Commercial Bank,* 142 U. S., 649, 650.
United States vs. *Oregon, &c., R. R. Co.,* 164 U. S., 540;
Barrett vs. *United States,* 169 U. S., 228;
Brunswick Terminal Co. vs. *Baltimore Natl. Bk.,* 192 U. S., 386, 396;
United States vs. *United Verde Copper Co.,* 196 U. S., 207, 213;
Blair vs. *Chicago,* 201 U. S., 400, 466, 467;
Louisville & Nashville R. R. Co. vs. *Mottley,* 219 U. S., 467.

To overcome the overwhelming presumption voiced by these authorities that Congress meant just what it said, the Commission has nevertheless declared that the expressed intention of Congress was futile because of supposed impossibility of carrying it into execution. In other words, although it was

regarded as possible to investigate and gather all the other information specified in every part of the five categories enumerated in the act, it was deemed impossible to investigate and report "separately the original and present cost of condemnation and damages or of purchase in excess of the original cost or present value" of the lands, rights of way and terminals owned or used for the purposes of a common carrier.

Whether or not such an investigation would be difficult or expensive or protracted is unimportant. That is likewise true of the other inquiries formulated in the Statute and which have been pursued during the past six years at enormous expense and with painful minuteness. The Congress, which declared it to be necessary to set on foot an investigation to the end that the Commission shall ascertain and report *"in detail as to each piece of property* owned or used by the common carrier for its purpose as a common carrier, *the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation* * * * and other values and elements of value, if any, of the property of such common carrier," and a further investigation and report " in *detail* and separately from improvements" as to "the original cost of all lands, rights of way and terminals owned or used for the purpose of a common carrier * * * as of the time of dedication to public use and the present value of the same," cannot be regarded as shrinking from difficulties or lightly deemed to have contemplated an impossibility, when, in the same connection, it required an investigation and report "as to the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." Congress must at

least be presumed as a result of such investigation to have seriously considered and determined the feasibility of acquiring what it looked upon as valuable and important information. It did not lay down any method of proof by which this information was to be obtained or deduced. It was contemplated that the Commission would adopt methods by which the several costs and values as to which it was called upon to report were to be ascertained.

Thus, in subdivision "First" of Section 19a of the act, the Commission is required in its report to give "an analysis of the *methods by which these several costs are obtained* and the reasons for their differences, if any," and likewise "an analysis of the *methods of valuation employed* and of the reasons for any differences between any such value and each of the foregoing cost values." In subdivision "Third" the Commission is directed to give "an analysis of *the methods of valuation* employed with respect to property held for purposes other than those of a common carrier."

The Congress certainly deemed it vital,not only for its guidance with respect to future rate legislation, but also for the protection of the public and of the carrier, to learn by the best methods attainable under the circumstances, what the condemnation cost and damages of the lands, rights of way and terminals of the several common carriers had been or would be. It must have throughly appreciated the common understanding that condemnation cost and damages constitute important factors in the valuation of lands used for railroad purposes. The Congress must be deemed to have known, as well as did the Commission, that when it called on the latter to report as to the present cost

of condemnation and damages or of the purchase of railroad property in excess of its original cost or present value, it would not be actually necessary to institute anew condemnation proceedings for lands already owned by the common carriers. The problem was not however of so recondite a character as to defy solution. In view of the magnitude of the labors and comprehensive character of the investigation which Congress commanded the Commission to undertake, it must have regarded the latter, or the experts and other assistants whom it was authorized to employ, to be competent, by the exercise of their reasoning powers and with the aid of such data as might be obtained by patient and industrious research, to make at least an accurate estimate as to what would be the original and present costs of condemnation and damages or of purchase as to which, by the terms of the act, the Commission was to investigate and report. That is precisely what is done by railroad engineers when they estimate in advance of construction what will be the reasonable cost of acquiring the lands necessary for the railroad. They draw on their own knowledge and experience and on that of others.

Whilst we may assume that, if Congress had required such investigation to be made by experts brought from the planet Mars, it would have been impossible to have carried out its intent, it is an entirely different proposition to say, that, by means of mundane experts possessed of ordinary reasoning powers diligently applied to matters of everyday experience, it would be impossible to accomplish what Congress had in mind.

After all, what is the meaning of the phrase "impossibility of performance" when applied to the

terms of a statute or of a contract? The Century Dictionary defines "impossibility" as "the quality of being impossible; incapability of being or being done." "Impossible" is defined: "1. Not possible; non-existent or false by necessity. (a) Beyond the strength or power of the agent. (b) Not possible from the nature of things; contrary to a general principle or law of nature or of thought; that not only is not, and will not exist or happen, under actual circumstances, but would not be under any circumstannces, within certain limits."

In *Klauber* vs. *San Diego Street Car Co.,* 95 Cal., 353, 30 Pac. Rep., 555, 556, the Court, quoted from *Hare on Contracts,* 639, the following passage dealing with the subject of impossibility of performance.

> "To warrant the application of the principle, the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or, as it is sometimes termed, be an *impossibilitas rei,* as distinguished from an *impossibilitas facti.* If the thing could be accomplished by any one with proper means and the requisite skill and knowledge, the promisor was not less answerable because it was impossible to him."

In *The Harriman,* 9 Wall., 172, Mr. Justice Swayne said:

> "The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be

shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance."

In *Reid* vs. *Alaska Packing Assn.*, 43 Oregon, 439, 73 Pac. Rep., 337, 339, Mr. Justice Bean said:

"Before one can be excused, however, from the performance of a valid contract, deliberately entered into, because of the impossibility of performance, it must appear that the thing agreed to be done is impossible upon its face, and cannot, by any means, be effected. It is no excuse for the non-performance of a contract that it is impossible for the obligor to fulfill it, if the performance be in its nature possible. 'If the covenant be within the range of possibility,' says Mr. Chief Justice Nelson, 'however absurd or improbable the idea of the execution of it may be, it will be upheld—as where one covenants it shall rain tomorrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible' (*Beebe* vs. *Johnson*, 19 Wend., 500). * * * Unless an act is inherently impossible within itself, a contract to do it is binding, although the performance may be improbable, or even impossible, to the promisor. To excuse performance, the impossibility must be something more than merely a great inconvenience, hardship, or even impracticability."

What is true of a contract is *a fortiori* true of a statute. Two individuals entering into an agreement are more likely to encounter impossibilities than a legislative body proceeding with deliberation and having at its command the highest intelligence of the land, especially where the subject-matter of the legislation is of such transcendent importance as the greatest single branch of national commerce. What more likely than that every word and phrase shall have concentrated upon it the most critical thought of the most acute intellects of the practical men of affairs and of the theoretical economists of the nation?

In one sense the Congress can make possible what private individuals cannot. It can overrule the decisions of courts, create new rules of evidence, and establish or permit resort to new methods of ascertaining data. Assuming that the *Minnesota Rate Cases*, 230 U. S., 352, hereafter referred to, had in fact laid down the doctrine which the Commission has deduced from that decision, it was within the competence of the Congress to adopt the method of valuation erroneously claimed to have been rejected by that opinion. That is, even though this Court rejected what was there termed "railroad value" as the basis for valuation—Congress, if it chose, could have adopted that basis. It is not unimportant to observe that those cases were argued in this Court in April, 1912, that the nature and importance of the question involved was such that they could not have escaped the attention of the Congress and its committees, and that the Valuation Act which we are now considering was enacted on March 1, 1913. It would be presumptuous to assume that, when Congress passed

this measure, it knew not what it did and sought to attain the impossible.

Nor is it a violent presumption that Congress was not oblivious of what Mr. Justice Harlan said in *Smyth* vs. *Ames*, 169 U. S., 546, with respect to the basis of all calculations as to the reasonableness of rates to be charged by a common carrier, namely, the fair value of the property used for the convenience of the public. Said he:

> "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be gven such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return on the value of that which it employs for the public convenience."

III.

The Commission having found the average acreage market value of adjacent lands and having applied it to the plaintiff's right of way, and the plaintiff having accepted this finding, it is an easy and simple process to find the present cost of condemnation and damages or of purchase, and the Commission should be required to do so.

It is one of the conceded facts of this case that the Commission has found and extended to plaintiff's right of way the average acreage market value of adjacent lands, and that this finding has been accepted by the plaintiff. The Amended Petition alleges (Rec., page 35):

> "Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it, in the following manner, to wit:
>
> Relator accepts, as a basis for such ascertainment, the present market value of its lands as found and determined by the respondent, and assumes that each parcel of land, having

reverted to adjoining owners as it would at common law upon its abandonment, would be re-acquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation. Where an entire parcel is thus acquired the cost of its acquisition will be its market value as determined by the respondent as aforesaid, plus certain incidental costs, such as court costs, and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken as determined by the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent, plus the incidental costs as aforesaid."

The Commission in its answer (Rec., 26), denies that the evidence thus tendered is competent proof of the present cost of condemnation and damage or of purchase, and so the issue is made.

The method employed by the Commission in ascertaining the average market value or the so-called present value of the plaintiff's lands, is thus described by it in the report of the Texas Midland Case, page 53:

"Present value is arrived at by ascertaining the number of acres of land owned or used by

> the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

There remains, therefore, no controversy concerning the average acreage market vaue of the so-called present value of the plaintiff's lands. The Commission has ascertained the average acreage market value of lands adjoining those of the plaintiff and has multiplied this acreage value by the number of acres owned by the plaintiff. The amount thus ascertained is called by the Commission the "present value" of the plaintiff's lands. We have accepted the Commission's findings of the average acreage market value of adjoining lands, and we have likewise accepted the Commission's computation of the number of acres of plaintiff's lands. We insist, however, that the Commission has not performed its full duty nor complied with the Valuation Act until it has gone further and ascertained the cost of acquiring the plaintiff's lands by purchase or condemnation, as of the valuation date. This the Commission erroneously assumes to be impossible of performance, for the alleged reason that it involves "inadmissible assumptions" and "impossible hypotheses." It says in the Texas Midland Case, page 62:

> "Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of

purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto."

The Commission reaches this conclusion from its interpretation of the *Minnesota Rate cases,* 230 U. S., 352, which is discussed in Appendix B. It is sufficient for present purposes to point out briefly the reasoning employed by the Commission in reaching the remarkable conclusion that it is impossible to ascertain the cost of the acquisition of plaintiff's lands by purchase or by condemnation.

It is said in substance (Rec., page 28) that the first step, in a land reproduction program, is to assume the non-existence of the railroad, and inasmuch as the adjacent lands, and likewise the carrier's lands, owe their market value, in a large degree, to the presence of the railroad, it is mere guess or speculation to undertake to determine their market value, in the absence of the railroad. Hence, it is said that to ascertain the reproduction cost of lands involves unwarranted and unlawful assumptions, and it is, therefore, concluded to be impossible to ascertain the reproduction cost because the basic factor, namely the market value of adjoining lands, as well as of the lands of the carrier, cannot be ascertained. Nowhere does the Commission say that, given the average acreage market value of adjacent lands or of the lands of the carrier, the cost of their acquisition by purchase or condemnation cannot be ascertained.

But the Commission has found the average acreage market value of adjoining lands and extended this value to the plaintiff's right of way and other

lands. We are not concerned with the process employed by the Commission in reaching this conclusion. Whether it assumed the existence or non-existence of a railroad, is a matter with which it alone is concerned. We are only interested in the fact that this most important finding has been duly made. There is no room for speculation or for indulging in assumptions or hypotheses in this regard. The finding has been made and the plaintiff has accepted it. Both parties are agreed and in complete harmony upon this issue. The average acreage market value of adjoining lands and of the carrier's right of way is an established fact in this case.

This basic factor, therefore, in establishing the cost of acquisition of the carrier's lands by purchase or condemnation, may be taken as the starting point. Our problem has become very much simplified. It presents this form: A designated right of way is to be secured by purchase or condemnation through Congressional subdivisions and city lots and blocks, extending from Kansas City to the Gulf of Mexico, the market value of which has been conclusively agreed upon by the parties. If the right of way is to be condemned, the jury will be instructed that the measure of damages is the agreed market value of the strips of land actually taken, plus the damage to the residue, where less than an entire tract is taken. If the right of way is to be purchased, the agreed market value is the basis of negotiations and the purchase price will approximate the market value of the strip to be purchased plus the damage to the residue of the tract of which it forms a part when less than an entire tract is purchased.

The doctrine applicable to this subject has been laid down in many cases, notably in *United States* vs. *Grizzard*, 219 U. S., 180, 183, 184, where Mr. Justice Lurton said:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing of course, injury due to the use to which the part appropriated is to be devoted. Thus in *Sharp* vs. *United States*, 191 *U. S.* 341, 353, *damage* resulting to adjacent but distant parcels was denied because there had been no actual appropiation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the use of that taken, to that untaken of the same tract. Upon this distinction the court said: 'Upon the facts which we have detained we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract.' To the same effect see Cooley's Constitutional Limitations, pp. 565-566."

See also:

Bauman vs. *Ross*, 167 U. S., 548, 574;
United States vs. *Welch*, 217 U. S., 333;
High Bridge Lumber Co. vs. *United States*, 69 Fed. Rep., 320;
South Buffalo R. R. Co. vs. *Kirkover*, 176 N. Y., 301, 304, 306;
Lincoln vs. *Commonwealth*, 164 *Mass.*, 368, 41 N. E. Rep., 489 (Opinion by Mr. Justice Holmes).

This rule has also been laid down in the various States in and through which the lines of the Kansas City Southern Railway Company run. Among other decisions in those States are:

Hamilton County vs. *Garrett*, 62 *Tex.*, 602;
Kansas Postal Telegraph Cable Co vs. *Leavenworth Bridge Co.*, 89 Kan., 418, 131 Pac. Rep. 143;
Kansas City So. Ry. Co. vs. *Second Street Improvement Co.*, 256 Mo., 279, 166 S. W. Rep. 296;
St. Louis & I. M. R. R. Co. vs. *Theodore Maxfield Co.*, 94 Ark., 135, 26 L. R. A., M. S., 1111;
Wichita Falls Ry. Co. vs. *Munsell*, 38 Okla. 256, 132 Pac. Rep. 906.

There is not the slightest difficulty under this rule to ascertain the cost of condemnation and damages. As a practical proposition such

ascertainment has been an every day occurrence from the beginning of railroad construction. Here the inquiry is much simpler than it is in the ordinary condemnation suit or in the ordinary case of the purchase by a railroad company of right of way. For, in the usual case *two* issues are to be determined,—first, the market value of the land actually taken, and, secondly, the damage to the residue of the tract from which it is carved. We have in the present case the latter inquiry to consider, yet we are gravely told by the Commission that although it has fixed the average acreage market value of adjoining lands, and has applied the same value to the carrier's lands, and we have accepted this finding without reservation, it is nevertheless impossible, starting with these data, to proceed further and determine what it would cost to acquire the right of way by purchase or condemnation. The Commission is in the same position as that occupied by a defendant land owner in a condemnation proceeding, where, after having agreed with the condemning plaintiff upon the market value of the lands taken he should ask the court that the condemnation proceedings be dismissed because of the impossibility of carrying them to completion, because in fixing the amount of damages to that part of his tract untaken, it would be necessary "to indulge in unwarranted and unlawful assumptions."

The Valuation Act is a statutory command addressed to the Commission to ascertain "the pres-

ent cost of condemnation and damages or of purchase" of the carrier's lands. The Commission is required to act as a condemnation jury would act if the lands were being condemned. The issues before it are plain and simple. It is required to find the market value of the tract, where an entire tract is taken, and where less than an entire tract is taken, its market value plus the damage to the residue. It has already determined the market value of the tracts taken and it only remains to ascertain the damage to the residue where less than an entire tract is taken. Let it be assumed that the agreed market value of the lands to be taken is $100 per acre. The only process remaining is to ascertain the damage to the residue where less than an entire tract is taken. Can it reasonably be said that this is impossible of ascertainment?

The fact that the Commission's estimate of the cost of acquisition of plaintiff's right of way by purchase or condemnation is to be made after its railroad has been constructed, and is in operation, presents no difficulty. As everyone knows, it frequently happens that a railroad is constructed and put in operation in advance of the acquisition of right of way, and that the damages to which the owner may be entitled are ascertained afterwards by purchase, by condemnation, or in a suit by the land owner for damages for the appropriation. Again it sometimes happens that at the time a railway company acquires its right of way there is an outstanding deed of trust or mortgage on it, which later on may be foreclosed, either with or without judicial proceedings. The company is thereby divested of its title so that it becomes necessary to

reacquire its right of way by purchase, by condemnation, or through a suit by the land owner for appropriation. In other words, as a matter of practical experience, it frequently becomes necessary for the railway company to acquire right of way after the railroad has been constructed and is in operation. It has never been supposed that such a case presents any serious difficulty. The courts have proven entirely competent to deal adequately with such a situation.

What the courts can thus readily do, is not impossible for a Commission which possesses wider latitude in the choice of methods than is ordinarily exercised by courts.

No "inadmissible assumptions" or "impossible hypotheses" are involved. It is not necessary to obliterate the railroad or to assume its non-existence, or even to stop the operation of its trains, actually or theoretically in order to establish the facts as to which investigation and report is commanded. It is not necessary to speculate upon what would happen if the railroad were removed with a resulting dislocation of industrial and commercial life. With the average acreage market value of adjoining lands agreed upon, all of such speculations, assumptions and hypotheses are behind us. It is only necessary to assume the reversion of the title to the right of way to adjoining landowners, as of valuation date or shortly prior thereto, and its reacquisition by purchase or by process of condemnation. Or it may be assumed that the plaintiff constructed its road with the consent of the landowners in advance of securing title to its right of way, or that its right of way was leased to it by the landowners at the time of construction and that the leases expired at or shortly prior to valuation date.

In either event it would be entirely practicable to determine with reasonable accuracy the estimated cost of re-acquiring by purchase or condemnation.

We contend not only that Congress meant this to be done, but that its purpose can be easily accomplished. But even were it difficult that would not excuse non-performance. Problems much more serious have been overcome.

Wakeman vs. *Wheeler & Wilson Mfg. Co.*, 101 N. Y., 205.
Schell vs. *Plumb*, 55 N. Y., 592.
Dennis vs. *Maxfield*, 10 Allen, 138.
Simpson vs. *London & N. W. Ry. Co.*, L. R. 1 Q. B. Div., 274.

IV.

Unless the Commission is required to ascertain the cost of condemnation and damages or of purchase of its carrier lands, the plaintiff will suffer great and irreparable injury, and its property will be confiscated to the extent of millions of dollars.

Unless the Commission is required in accordance with the command of Congress to ascertain the reproduction cost of the carriers' land, its investigation will be limited to its so-called present value of the bare land constituting its right of way and terminals. When the plaintiff finally submits to the Commission its claim that a figure, representing the final value of all its property, shall be de-

termined by it, as required by the Valuation Act, the only piece of evidence on the subject of land values before the Commission will be this so-called present value. It will not be possible to urge upon the Commission that the value of the plaintiff's lands is at least equal to what it would cost to reproduce them or re-acquire them, as of valuation date, for no evidence to support the claim would be in the record.

The Commission has thus pre-judged our case. It has decided in advance that evidence of the cost of reproducing lands will not be admitted in evidence, and hence cannot be considered in the determination of final value. Other costs of reproduction, such as the cost of reproducing grading, ties, rails, bridges, buildings and equipment will be before the Commission as pieces of evidence bearing upon the subject of final value. But for some unaccountable reason, an exception is to be made with respect of the lands on which the railroad structures are placed and acquired for the sole purpose of accommodating such structures. The value of the lands is to be computed, not at what it would cost to acquire them, but at the average acreage value of adjoining lands.

Everyone knows that to acquire a railroad right of way costs from two to three times the market value of adjacent land. The Commission frankly admits this to be true. In the *Texas Midland Case* (Report, page 170), is found this concession:

> "It canot be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased, materially exceeds the acreage value of the

> land taken. * * * For the purpose of determining the excess of such cost over acreage value, many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which varied for rural right of way from 150 to 300 per cent., being less in the case of city lands."

Judge Prouty, the Director of Valuation, in the Memorandum filed by him in that case, explicitly admits that the cost of acquiring its lands by a railroad company materially exceeds the market value computed by the acreage of the lands actually taken. He gives his reasons succinctly (page 48):

> "It is generally understood that the cost of acquiring its lands by a railroad materially exceeds the market value by the acre of the lands taken. This is partly due to the peculiar shape of the piece required and partly to other causes. This excess cost to the carrier of obtaining its right of way is a thing of importance in determining the value of its property. The general opinion seems to be that this was the fact for which Congress intended to inquire. What would it cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?"

At the hearing of the protest made by several railway companies, including the plaintiff, held by the Commission in Washington on March 24-28, 1917, in the course of the examination of a witness introduced to prove that the cost of the acquisition

of right of way exceeds the market value of the naked land similarly situated in the same vicinity, the Director of Valuation in the course of a colloquy between counsel, said (pages 111, 112 of Record of Proceedings):

"Director Prouty: Now, may I ask once more, Mr. Chaiman, what bearing that has on any issue which we are trying here?

Mr. Bledsoe: Mr. Director, its purpose is to show that the actual cost of the land, when acquired for railway purposes, is in excess of what may be termed the market value of a similar strip of land in the same community.

Director Prouty: You mean by that that it costs more to acquire a railroad right of way than the acerage value of the land embraced in the right of way?

Mr. Bledsoe: Yes, that is part of what I mean, Mr. Prouty.

Director Prouty: *Now that, Mr. Chairman, has never been denied by the Division of Valuation and is not now denied, and it hardly seems worth while to introduce testimony to establish a fact about which there is no controversy.*

Mr. Brantley: Mr. Director, you found a great deal less than the cost of acquring the land.

Director Prouty: I have already stated, Mr. Chairman, that it is our understanding of the Minnesota Rate Case that the value of the adjacent land is to be taken as the value of the right of way. Now, if that is not the holding of that case, then we make no question but

what, as a matter of fact, the value must be found. *In other words, we make no question but what as a matter of fact it costs the railroad company more to acquire its right of way through a piece of land than the acreage value of the land taken, measured by the value of adjacent land.*"

These statements of the Director of Valuation are not physically contained in the present record, but it is well known that perhaps to a greater and more comprehensive an extent than anybody else in this country Judge Prouty has studied the valuation of railway property. Hence his public statements on a subject with which he is so familiar in its technical and practical aspects, like those of any other recognized eminent authority, may be quoted with entire propriety.

Mineral Separation vs. *Butte & Superior Mining Co.*, 250 U. S., 351, 352.

It is not necessary, however, to go beyond the admitted facts in this case to demonstrate the palpable injustice of requiring the plaintiff to submit its case to the Commission with no other evidence of land value than the so-called present value of the segregated right of way. It appears from the Amended Petition (Rec. 34) and the admission in the Answer (Rec. page 26), that the plaintiff during the four years preceding valuation date acquired certain parcels of land for right of way purposes through condemnation proceedings at an actual cost to it of $180,000, and that these same lands have been determined by the Commission to be of the so-called present value of $60,000. The evidence of what these lands actually cost the plaintiff was adduced before the Commission an-

nounced its final ruling to exclude and disregard evidence of that character.

Are lands which actually cost the carrier $180,000, in condemnation proceedings, during the theoretical period of reproduction, to receive a final valuation for the purposes of rate regulation, the issue of securities, the consolidation of the carrier with other carriers and other objects at *one-third* of their actual cost? Or stated differently, when the plaintiff finally presents its case to the Commission upon the question of the final value of its properties for all purposes of public control, is it to be limited, as to these particular lands, to the so-called present value of $60,000, and denied the right even to argue to the Commission that since these lands actually cost the plaintiff $180,000 in condemnation proceedings they should be determined to be fairly worth that sum?

If the foregoing typical illustration is not sufficiently striking, let us take into consideration the allegation of the Amended Petition (Rec. page 35), which is not denied in the Answer, that the refusal of the Commission to ascertain the cost of the acquisition of the plaintiff's right of way by purchase or by condemnation will reduce its land schedule by at least $5,000,000. In other words, this vast sum represents the difference between the Commission's so-called present value of plaintiff's carrier lands and their reproduction cost. The mileage of the plaintiff's railroad is approximately one-third of one per cent. of the entire railroad mileage in the country. The difference, therefore, between so-called present value and the cost of acquisition by purchase or condemnation of the lands of all the railroad of the country, approximates $1,500,000,000.

If the Commission is permitted to persist in its refusal to admit evidence of the cost of the acquisition of lands by purchase or condemnation, the only evidence before it concerning the total value of the plaintiff's lands will be the so-called present value, which, as shown, is admitted to be $5,000,000 less than their reproduction cost. Naturally the Commission cannot place a value upon the plaintiff's lands upon evidence not in the record. Hence plaintiff's lands as an entirety will be valued at $5,000,000 less than the sum required to purchase or condemn them as of the valuation date.

Can it be plausibly contended that a result thus confiscatory in its consequences was ever intended by Congress in its enactment of the Valuation Act? Is not the very converse of such a purpose, evidenced by the clause which the Commission has avowedly expunged from the statute? Not even the most radical extremist has hitherto contended that in placing a valuation on a railroad there are to be elimated from the carrier's investment moneys actually, providently and economically expended in producing the property employed in public service, and that the carrier is not entitled to a reasonable return on such investment.

The Commission has found the so-called present value of all the plaintiff's lands, to aggregate approximately $5,000,000. This is not, nor does it purport to cover the present cost of condemnation or of purchase. It is only the average market value of adjoining lands applied to the area of the plaintiff's right of way. It is common knowledge that these right of way lands could not, as of valuation date, be reproduced for a sum in any way approaching the value as found. As above shown, the Amended Petition contains the undenied al-

legation that the acquisition of these lands by condemnation or by purchase would exceed the so-called present value by $5,000,000. In other words, it would cost $10,000,000 to reproduce these lands but the Commission has arbitrarily refused to yield obedience to the command of Congress that it investigate and report as to this significant fact.

The Commission under the Valuation Act is engaged in investigating and valuing all of the railroads in the country, and the decision of the issue in this case will affect the land schedules and the land values of all of them, We feel justified, therefore, in illustrating our argument by hypothetical cases which are quite likely to represent actual situations.

Let us assume that a railroad line parallel to that of the plaintiff had been built, and its right of way had been acquired during the theoretical construction period, that the quality, location and value of its lands were exactly the same as the plaintiff's and had actually cost $10,000,000. Could anybody justly contend that either should be valued at less than $10,000,000? If the lands of plaintiff are valued at one half their *theoretical* cost of reproduction based on the average market value of adjoining lands, would it not for the same reason, necessarily follow that the lands of the other company should be likewise valued at one-half of their *actual* cost?

Again, let us assume that the plaintiff had acquired its entire right of way from Kansas City to the Gulf, during the three year theoretical reproduction period prior to valuation date, in a prudent and economical manner, at a cost of $10,000,000? Would that not be universally

regarded as the fairest indication of its value? Would it not violate one's sense of right and justice to reduce the valuation to $5,000,000, simply because that represented the value of the actual right of way based solely on the average value of adjoining land? The position of the Commission appears to be that as soon as a right of way has been acquired, e g., by condemnation proceedings where it must be presumed that courts and juries have fairly assessed the value of the land taken and the damage suffered by the land untaken, at a cost of $10,000,000, the value of such right of way at once recedes to $5,000,000 because more than the average market value of the adjoining land has necessarily been paid, by reason of the necessity of compliance with the constitutional obligation to compensate the land owners for damages to lands not actually taken.

Let us once more assume that the plaintiff possessed nothing but its bare right of way extending from Kansas City to the Gulf, and that it was willing to sell this right of way at its fair value. What would determine the price paid by a willing purchaser? Obviously, a sum approximating the cost of acquiring a parallel right of way of equal value and extent, which, using the same figures, employed in the previous illustrations, would be $10,000,000. Would a purchaser, under normal conditions have the slightest expectation of acquiring plaintiff's right of way for $5,000,000, upon the theory that that sum would represent the fair value of the property computed on the basis of the average market value of adjoining land, leaving out of account the cost of condemnation and damages?

The *Minnesota Rate Cases,* by which the Commission seeks to justify its position, and which will

be discussed at length in Appendix B have been erroneously interpreted. Their dominant note is market value. Present cost of condemnation or of purchase should be based on market value, applying the well understood rules applicable to the exercise of the right of eminent domain. The lands to which we have above referred as having been condemned by the plaintiff at a cost of $180,000, should be accordingly valued at that sum, and they would be so valued under a proper interpretation of those cases. The entire lands and rights of way of the plaintiff should be valued at what it would fairly cost in the market to reacquire them, which for the reasons shown should not be less than $10,000,000, instead of $5,000,000, at which the Commission proposes to value them after encroaching upon the powers of Congress by repealing or expunging an essential part of the statute that defines and controls the powers of the Commission.

In concluding what we have to say of this aspect of the case we again quote from the Director of Valuation, who at page 50 of his Memorandum above referred to, this aptly and forcefully demonstrates the justice of our contention:

> "But will acreage value coincide with present value in all cases? Suppose railroad A was constructed in 1912 and valued as of June 30, 1914. That railroad paid for its right of way lands $1,000,000. The acreage value of those lands as fixed by our appraisers is $500,000. This is no fanciful illustration. Cases as strong are now under investigation by the division. Can this acreage value be treated as that present value for which the statute calls? Is it the present value of the court in the

Minnesota Rate Case, that value upon which the railroad is entitled to earn? I find it difficult to believe that it can be. Unless the value of lands has declined between the date of purchase and that of valuation or the carrier paid an extravagant price in the acquisition of its lands or some other equitable reason to the contrary exists, the court will hardly require that road to accept a return upon less than actual cost."

V.

There are no practical difficulties in the way of ascertaining the present cost of condemnation and damages or of purchase of plaintiff's lands.

The Director of the Bureau of Valuation is the officer charged by the Commission with the compilation of the various schedules called for by the Valuation Act, including the land schedule. He is undoubtedly more familiar with the problem than anyone else, having devoted several years to its consideration. It is most significant that he has not the slightest doubt that the cost of reproduction of lands can be determined with reasonable accuracy, *even where the average market value of the lands has not been agreed upon.* In fact, in his judgment there are two methods, by either of which it may be done. One is to treat each tract or parcel of land as a separate problem and ascertain the cost of its acquisition, as would be done in a condemnation proceeding. The other is to determine a percentage or multiplier to be applied to the

market value of adjoining lands, in order to determine the cost of acquisition of the right of way.

If the Commission decides that the cost of reproduction of lands is to be ascertained and reported, he as Director of the Bureau of Valuation is ready to proceed to do so. This is his statement to the Commission when the plaintiff's case, together with four others, were heard before the Commission at Washington on March 24-28, 1917. At pages 230, 231 of the record of that hearing the views of the Director are plainly set forth. They fully confirm what we have said, as appears from the following excerpts:

> "Director Prouty: I understand, Mr. Chairman, that Mr. Butler is trying to prove that knowing the acreage value of the lands taken by a railroad company, it is possible to apply a percentage to that acreage value which will reasonably express the costs of acquiring that land by the railroad company. I understand that is his proposition.
>
> * * * * * * *
>
> Director Prouty: Now, if the Commission please, I concede that. I concede that it is possible, from the experience of carriers in the past, to determine, not accurately, but within certain limits, a multiple or percentage, or whatever you may call it, which you can apply to the base value of these lands in ascertaining the cost of those lands to the railroad company, and we do not need to introduce any more testimony to prove that. I have never denied it.
>
> They also undertook to say that—

Commissioner Clark: Well, Mr. Prouty, do you want to ascertain the cost to the railroad company or in ascertaining, the reasonable proper value of it?

Director Prouty: I mean in ascertaining what it would cost the railroad company to acquire it.

Commissioner Clark: In advance of acquisition?

Director Prouty: *Yes; you may say in advance of acquisition, or after acquisition, or at any other time.* Of course, the estimated cost of acquisition would not be the exact cost that the railroad company might pay, because the amount which a railroad company might pay depends greatly on the personal equation. It makes a difference to a land owner as to what kind of real estate men you have; it makes a difference to the land owner as to how you go at it, whether you undertake to condemn it and get everybody mad, or whether you buy it. A great many things enter into that question; but I mean to say, on the average, you can determine a percentage which expresses the difference between the value of this land by the acre, estimated as we are estimating it now, and what it would cost the railroad company to acquire that land. Now, whether the cost of acquiring the land by the railroad company is the value of it or not is something I do not know anything about, but that is what it costs to get it, that is what it had to pay for it. I concede that that sort of a multiplier or percentage ratio can be determined. It has been determined time after time, it has been

applied time after time. While it is not very accurate, it undoubtedly can be done, within certain limits.

Now, that is the first thing that Mr. Butler proposed to do; and I do not deny that it can be done. I do not admit that that his figures are accurate.

Mr. Butler: Oh, no, no.

Director Prouty: If it is going to be done, we want a chance on our part to take these figures and analyze them. We want to go to work on it in our own way. If you say the thing should be done, we shall undertake to do it.

Now, Mr. Butler says, in the second place, they are going to do another thing, *that they are going to take each parcel of land which has been acquired, and they are going to assume that it has to be re-acquired, and they are going to put a man on to testify what the railroad company would have to pay for each piece of land; I mean for the damages to that land.*

Now, Mr. Farrell says that the Supreme Court has decided that that cannot be done. I have never seen any two people who agreed about the *Minnesota Rate Case,* and I am not speaking as a lawyer in this case, at all, but as a matter of fact, personally, *I have got to concede that that can be done, too, because if the railroad company were condemning that piece of land, and you had gotten into court before a jury, you would have to produce a witness and ask him exactly that question.*

Now, a question that can be asked of a witness and that the witness would be allowed to answer, and would be compelled to answer, certainly is a thing which is susceptible of proof.

So I am not going to stand here and say that that cannot be done. It would be a most unreasonable thing to undertake to do it. It would cost more than the valuation of the lands of the railroads of this county, but, then, I am not going to say that it cannot be done. *I concede that it can be done, and it seems to me that upon those concessions, we might well stop the introduction of this kind of testimony and proceed with the real question, which is whether, upon this statute, it shall be done.*

That, I think, is the question which you gentlemen have to decide, and which you ought to decide before we proceed further with the taking of this testimony."

The Director of Valuation says in his Memorandum above referred to (page 53):

"I have never contended myself that it was impossible to report this fact. This is the issue in every condemnation case. Upon that issue witnesses are called and a conclusion is finally reached. *It can hardly be said that the Commission could not investigate and report its conclusion.*

Nor has the Supreme Court decided that this fact cannot be shown, but rather that the fact when it is shown has no probative value. My thought has been that the commission was not

justified in throwing away millions of money to establish a fact which the Supreme Court of the United States has held since the passage of the act to be of no account when ascertained."

The Director's recommendation, however, is that if the Commission is of the opinion that the cost of reproducing the land should be compiled, then it can best be done by means of a multiplier, with respect to which he says (page 53):

"If the commission is of the opinion that the act does require it to report this fact, and that this requirement of the act should be complied with before calling to the attention of Congress the decision of the Supreme Court, this can probably be done by another method, which will produce a more accurate result and will not involve much effort or expense.

It is generally understood that a railroad must pay for its right of way something more than the acreage value of the land which it takes. It has been the general impression that the value of the right of way of a railroad was determined by the cost of acquiring that right of way at the time in question under the then land values. Therefore in order to determine the value of its right of way, it has been necessary to first determine this excess which the railroad must pay over and above the acreage value.

For this purpose, studies have been made by State commissions and others. The actual expenditure by a railroad for its right of way

in a particular case is known. The acreage value of the land acquired can be determined with substantial accuracy in just the way that our people are determining that fact to-day. The difference between the amount actually paid by the railroad and this acreage value represents the excess cost.

The result of these studies has usually been stated in the form of a percentage or multiple; that is, the excess cost would be as much as the acreage cost, or it might be one-half as much or twice as much. In any event it was stated in terms of a percentage of the land cost and was ordinarily known as a multiple.

The result thus obtained was not exact. As applied to individual parcels it would indicate almost nothing. As an average applying to an entire railroad or to the railroads in an entire section it was fairly accurate. There would be one multiple for the city and another for the country. The multiple might vary between different sections of the country; it might perhaps vary between different railroads according to the conditions under which the railroad was constructed. Taken on the whole, it would be fairly reliable."

The Commission itself, apparently believes that the cost of the reproduction of the land can be ascertained and reported, if its importance justified the expense, for it says in the *Texas Midland case* at page 169, of its report:

"If the Commission is to report this fact and if its report is to be of any value when

made, it must ascertain the fact by a detailed analysis of the damages in case of each parcel. The present force of the Commission is not qualified without further instruction, to do that work in a satisfactory way. Estimates have been made of the additional cost, but they are not reliable. It can only be said that the expense of our land work would be very largely increased.

It should be noted among other things that these values are to be reported as of the present time: The location and extent of the parcels must be considered, therefore, not as they existed when the railroad was built, but as they exsist today. In case of older roads there have been very important changes in the size and frequently in the use of these parcels, so that the first requisite would be a resurvey of the road and an accurate determination of the parcels to be condemned. This of itself would involve a large outlay on the part of either the railroad or the government."

Again, the Commission at page 170 apparently concedes that a percentage or multiplier could be arrived at, which would represent the relation between the market value of land and its cost of acquisition by purchase or condemnation, for it says:

"It cannot be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased materially exceeds the acreage value of the land taken. Previously to the decision of the Supreme Court in the *Minnesota Rate*

Cases it seems to have been understood by many Commissions and valuators that the proper method of determining the present value of the operative land of a carrier was to inquire what it would cost to acquire those lands upon the basis of present prices. For the purpose of determining the excess of such cost over acreage value many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which varied for rural right of way from 150 to 300 per cent. being less in case of city lands.

It would be possible for the Commission to investigate along these same lines and to report something in the nature of an average percentage, but such a figure would be of little or no significance as applied to individual railroads, and would be tantamount only to a general statement that there is such additional element of cost which usually falls within certain limits. The Commission has not felt that this would satisfy the requirement of the statute, and has believed, as already stated, that it was practically impossible to report the fact called for."

Apparently the Commission had in mind the ascertaining of an average percentage for the *entire country,* applicable alike to all railroads. It is true that *such* a percentage might be of little value when applied to the several railroads, independently. But this entirely overlooks our contention that the percentage should be computed for each individual line, based upon statistics applicable to it, which

are readily available. Each individual line should be treated as a separate problem, or perhaps it might be subdivided into divisions, depending upon the special conditions that may exist. Rural lands should be treated separately from urban lands. The cost of acquiring lands through the pine forests or cut-over lands of Louisiana varies from that incident to the acquisition of right of way through agricultural lands in Missouri and Kansas. The latter in turn is entirely different from the cost of acquiring lands in the uncultivated portion of the Ozark Mountains. A study of each line must of course be made, with a view to ascertaining a fair percentage or multiplier applicable to it. This is what was contemplated in the stipulation made between the relator and the Bureau of Valuation quoted in the Petition (Rec, page 32), which provided for the ascertainment of the cost of reproducing lands by either of the two methods, plaintiff is willing to comply with the terms of the stipulation.

VI.

That certain of plaintiff's lands were acquired by donation presents no difficulty in the way of ascertaining their present cost of condemnation and damages or of purchase.

The Commission, in its Answer points out another supposed difficulty in the way of ascertaining and reporting the reproduction cost of land.

> "It is because there can be no certainty as to what land would have to be acquired at a cost

to the carriers upon reproduction to present acquisition."

It points out the fact that certain lands of the Texas Midland Railroad Company were acquired by donation, and suggests that it would be impossible to say upon a theoretical reacquisition or reproduction what proportion of plaintiff's lands would be respectively acquired by donation, or by purchase or condemnation.

It might be said in passing, that the same difficulty would inhere in the ascertainment of the "cost of reproduction new" of the constituent parts of a railroad other than the land. It frequently happens that the grading of part of the road-bed is the subject of a donation, where, for illustration, third parties grade for a spur or side track or for a station site. Ties are sometimes donated. Frequently money is given to a railway company, and is used in the construction of machine shops, depot buildings and other structures. The Commission has properly ignored such sporadic occurrences and has computed its cost of reproduction schedule upon the theory that all materials are to be acquired by purchase and that all labor be paid for in cash.

No reason is perceived why the same rule should not apply to lands. The statute expressly so requires. It calls for "the present cost of condemnation and damages or of purchase," *not* of lands, originally purchased or condemned by the Railway Company, but "of *all* lands, rights of way and terminals owned or used for the purposes of a common carrier." But two questions are presented; 1, what lands, rights of way and terminals did the plaintiff own or use for the purposes of common

carrier; and, 2, what is the present cost of condemnation and damages or of purchase of those lands? The provision is not ambiguous. There is no room for speculation or conjecture as to what lands are involved, because the requirement of the statute operates upon *all lands*, whether originally acquired by purchase or condemnation, or by gift or by operation of the statute of limitations or in any other conceivable manner. By the subdivision entitled "Fifth" of §19a of the Valuation Act, the amount and value of all donated lands is to be reported separately.

There is another reason, why the reproduction cost of lands should include all lands of every kind, character and description and however acquired, whether by donation or otherwise. The purpose of the reproduction schedule is to furnish a piece of evidence to be used by the Commission in its determination of final value of all the property of the carrier. It is now settled that the carrier is entitled to have included in the final valuation of its property the value of donated lands, or donated property of any kind to which it holds title. If the reproduction schedule of lands omitted the reproduction cost of donated lands, or lands which the Commission might say, would be donated in the event of a reacquisition of the right of way lands, in the process of reproduction, it would be defective, because it would omit elements proper and even necessary to be considered in reaching a judgment of final value.

VII.

The rulings in the Minnesota Rate Cases and related cases, do not relieve the commission of its plain duty under the valuation act to ascertain and report the cost of condemnation or of purchase of the plaintiff's lands.

An analysis of the *Minnesota Rate Cases*, 230 U. S., 352, and of the *Denver Water Works*, 246 U. S., 178, in so far as they bear upon the present is appended to this brief as Exhibit "B." They may be summarized as deciding:

(a) Market value, as distinguished from the artificial conception of "railway value", must be the basis of land reproduction calculations. In other words, in determining the reproduction cost of a railway right of way, the market value of adjoining land is the basis or starting point, to be followed by the aplication of the well understood rules regulating condemnation of private property for public use.

(b) It is illogical to assume the non-existence of a railroad, and at the same time to act on the theory that the values of the adjacent lands, which the presence of the railroad has helped to create, remain unchanged. To do so is to proceed upon an "impossible hypothesis."

The Commission professing to follow the *Minnesota Rate Cases*, now contends that to ascertain the reproduction cost of plaintiff's lands involves the assumption that its railroad would first be removed before the estimate can be made, and that, when removed, an unknown and unascertainable shrinkage in the value of adjacent lands would take place,

and hence no rational estimate of reproduction cost can be made.

There are several conclusive answers to this contention:

1. When the Commission assumes the railroad to be non-existent, and argues that the market value of adjacent lands cannot be ascertained by any known process, and that without such market value as a basis or starting point, it is impossible to determine reproduction cost, it overlooks the fact that it has already determined the average acreage market value of adjoining lands, in the present valuation proceeding, and that the plaintiff has accepted this finding. Consequently there is a starting point, leading to an easy and simple process for the ascertainment of reproduction cost. The Commission has, therefore demonstrated the fallacy of its own argument. If the rule announced in the *Minnesota Rate Cases* presents any obstacle to the determination of the reproduction cost of land (which we deny) the Commission itself has overcome it by finding the market value of adjoining lands.

2. Unquestionably, the Commission has proceeded properly, as required by the Valuation Act, in the determination of the market value of these lands. It has rightly taken these values as it found them on the valuation date. It has not assumed that these values would shrink or be otherwise affected by the hypothetical removal or annihilation of the railroad. That is precisely what Congress intended. The railroads, in being and in operation, were to be valued for the purposes of future rate

making and for all other purposes of governmental control. If through their existence and activities the carriers' lands have increased in value, they were to be entitled to such increase. If their physical properties were worth more than when originally acquired, that increment of value was to be included. If by wise and prudent management a large volume of traffic has been fostered and developed, that element of value was also to be considered. It certainly was not to be disregarded upon the assumption that there was no railroad in existence over which it might move. Nor were the physical properties of the carrier to be estimated at their "junk value" because not appurtenant to railways existing and in operation. The value of the lands of which they were composed was not to be diminished because of a suppositious cessation of the railroad, which helped to create their value.

3. We further deny that it is necessary to assume the non-existence of a railroad in order to determine the reproduction cost of its lands. It was wholly unnecessary to make this assumption in the *Minnesota Rate Cases*. Just why it was made, is not apparent, but evidently that theory was advanced by the carriers and consequently the Court dealt with it as presented.

The problem is after all an exceedingly simple one. A railroad having a right of way one hundred feet wide, eight hundred miles long and extending from Kansas City to the Gulf of Mexico is to be valued. Its operation upon this right of way has contributed to the building of cities, the development of agricultural and mineral lands, and the

location of valuable industries. What is this right of way worth on the valuation date, and how is its value to be determined? One essential piece of evidence is its reproduction cost or what it would cost to purchase or condemn it. There is no justification for asserting that before reproduction cost can be ascertained it is necessary to assume the non-existence of the railroad, and the annihilation of the adjacent cities, industrial, agricultural and mineral development. As well might one assume the non-discovery of America or the non-existence of the State. It is the railroad right of way, in its relation to the railroad and taking into account the actual urban, industrial and agricultural development, that is to be valued. To disregard them would be as unsound as it would be in valuing oil lands to assume the non-existence of their oil bearing strata, or to value coal lands on the assumption that the underlying coal is non-existent. If by final judicial decree or otherwise, all of the right of way deeds or condemnation decrees held by the plaintiff were suddenly declared to be null and void, immediate proceedings would be necessary to re-acquire its right of way by purchase or by condemnation. Would anyone for a moment suppose that this would require the assumption of the removal of the railroad or of its non-existence? Nothing of the kind would be dreamed of. The practical way to meet the situation would be for the plaintiff to send out its right of way men to acquire the tracts of land covered by the invalid deeds or condemnation proceedings, and purchases would be made wherever reasonable terms could be obtained, and where purchases were impracticable, the legal department would be called upon to in-

stitute and prosecute condemnation proceedings. Thus the title would be re-acquired. What the plaintiff itself would do as a practical matter in such circumstances, the Commission can and should do under the requirements of the Valuation Act. The plaintiff's right of way agents and its condemning attorneys would never think of assuming the non-existence of the railroad, nor should the Commission. Any such unnecessary and unwarranted assumption only serves to create difficulties and complications where none exist.

4. A complete answer to the Commission's contention is that Congress, for its own purposes, has determined, in the enactment of the Valuation Act, that the reproduction cost of land shall be ascertained for the two-fold purpose of securing evidence bearing up the final value of the railway properties, and of providing Congress with essential information for its use and guidance in future legislative dealing with railway properties. Congress has commanded the Commission to do the precise thing that the Commission has thus far refused to do. Its excuse for non-performance is that the task is an impossible one and it falls back on the *Minnesota Rate Cases* for its support. But this Court did not say in those cases, even under the construction placed upon them by the Commission, that this *statutory* command could not be complied with. No such statutory command had there been given, and therefore could not be, as it was not, considered. The Court did not decide that the reproduction cost of a carrier's land compiled in response to a statutory requirement was not proper and competent evidence of its value.

If the valuation statute had said in substance: "Assume that all right of way, deeds and condemnation proceedings by which the carrier acquired its title or easement became null and void at the beginning of the theoretical reconstruction period, and ascertain what it would cost by purchase or condemnation to re-acquire the right of way", would the Commission be permitted to say, in this Court, that the task was impossible of performance? Certainly not. Yet the Valuation Act is sufficiently broad and comprehensive to include this as *one* of the methods to be adopted by the Commission.

VIII.

It is respectfully submitted that the judgments of the Supreme Court and of the Court of Appeals of the District of Columbia be reversed and the cause remanded with instructions to issue a peremptory writ of mandamus as prayed for in the amended petition of the plaintiff in error.

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Appendix A.

An Act to amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts Amendatory thereof by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding thereto a new section, to be known as section nineteen a, and to read as follows:

"Sec. 19a: That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classifi-

cation of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"FIRST. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"SECOND: Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

"THIRD: Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of

the same, together with an analysis of the methods of valuation employed.

"FOURTH.—In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

"FIFTH.—The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any state, county, or municpial government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants, of land to any such common carrier, or any previous corporation operating such prop-

erty, by the Government of the United States or by any state, county, or municipal government, and the amount of money deprived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any state, county, or municipal government in consideration of such aid, gift, grant, or donation.

"Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

"Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

"Every common carrier subject to the provisions of this Act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, con-

tracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to corporate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

"Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property, of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Col-

umbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

"To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the commission may require.

"Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall became final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall became final as of the date thereof.

"If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may

be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February Fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

"If upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the com-

mission shall alter, modify or amend its order, such altered, modified, or amended order shall take the place of the original order com plained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forefeitures provided for in section sixteen of the Act to regulate commerce.

"That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section."

Approved March 1, 1913.

APPENDIX B.

An analysis of the Minnesota Rate Cases and related cases insofar as they may be claimed to affect the issues in the present case.

Our present purpose is to analyze the *Minnesota Rate Cases*, 235 U. S., 352, and related cases, for the purpose of demonstrating the unsoundness of the contentions made by the Commission, in justification of its failure to ascertain and report the cost of condemnation or of purchase of the plaintiff's lands. They are:

1. That the ascertainment of the cost of condemnation or of purchase of the plaintiff's lands involves the making of inadmissible assumptions and the employment of impossible hypotheses, which render compliance with the command of the statute, impossible.

2. That the cost data, if assembled, would serve no useful purpose, because the ultimate question to be determined by the Commission is the value of the plaintiff's lands and rights of way, and that such value cannot be greater than the market value of adjoining lands.

We earnestly insist that these contentions of the Commission are essentially and fundamentally unsound, and that its position in this case is wholly unjustified. It will be the purpose of this discussion to demonstrate that this is so.

Preliminary to any consideration of the issues considered and determined in the Minnesota Rate Cases and their application to the instant case, it is highly important that certain considerations be constantly borne in mind.

(a) *The Valuation Act contemplates and requires estimates to be made and assumptions to be indulged.*

In the nature of things, the cost of condemnation or of purchase of lands, must be estimated. It is a theoretical or hypothetical process that is to be applied. No actual condemnation proceedings or actual sales are contemplated. Congress intended this to be an estimate. It is impossible to conceive that it could have intended anything else.

The command of the Valuation Act therefore, is that the Commission shall make an estimate of the cost of condemnation or of purchase, with as much accuracy as the nature of the subject matter will permit. This necessarily requires the making of certain assumptions of fact which are contrary to existing facts. It must be assumed, among other things, that the plaintiff parts with its title to its lands, and that it proceeds by condemnation or purchase to re-acquire them. Constructive trials of condemnation cases must be had in which the Commission, performing the function of a jury, must determine the market value of the various tracts of land taken (unless that has been agreed upon as in the present case) and the damage to the residue when less than an entire tract is condemned. Constructive purchases must likewise be made and here also the function of the Commission is to determine the market value of the various tracts of land taken (when not agreed upon) and the damage to the residue where only a part is purchased. Constructive trials and constructive purchases depend upon assumptions and result in estimates. The intent and spirit of the Act is that the Commission shall indulge in all assumptions that may

be reasonably necessary in order to make the estimates which the Act requires to be made.

The plain purpose of Congress in requiring the Commission to assemble the present cost of condemnation or of purchase of the lands and rights of way of each carrier, was to provide *a piece of evidence* material and relevant to the issue of final value of the carriers' property. The purpose thus to be subserved furnishes a guide for the interpretation of this provision of the Act. In the judgment of Congress such an estimate was competent, material, and relevant evidence to be considered by the Commission in its determination of final value. The weight of this evidence is for the Commission itself to decide.

The action of the Commission, in refusing to make an estimate of the cost of condemnation or of purchase of the plaintiff's lands and rights of way, is in defiance of the express provision of the Act itself and is in conflict with the entire spirit and intent of the Act, as well as with the judgment of Congress which passed it. The considerations which have been influential in inducing the Commission to assume this attitude should be of transcendent and compelling importance, to warrant the extraordinary consequence of nullifying an Act of Congress.

To obey, or not to obey the express command of the Valuation Act to compile schedules, and to determine therefrom the ultimate fact of value, was the question before the Commission, but that was not, by any means, the question before the Court in the *Minnesota Rate Cases*. The Court did not have before it for consideration, an estimate of the cost of condemnation or of purchase of the lands and rights of way of the carrier, *made by an admini-*

strative body under an Act of Congress. It could not, therefore, have expressed any opinion concerning the right and duty of the Commission to proceed in the manner indicated, nor concerning the probative force of the data compiled as the Act requires.

The Court did have before it a schedule of cost of re-acquisition of lands and rights of way which is now conceded by all to have been excessive in amount and to have been compiled upon untenable theories. This schedule the Court justly condemned, but in doing so it did not hold nor did it intimate that the present cost of condemnation or of purchase of the lands or right of way of the carrier could not be ascertained, or that when ascertained it could not be used as a piece of evidence in the determination of the final value of the carrier's property.

(*b*) *Matters which were not before the Supreme Court for decision and which, therefore, were not decided.*

What was *not* decided in the *Minnesota Rate Cases* surpasses in importance, for the purpose of this discussion, the matters which were in fact considered and passed upon in those cases. It is highly significant that the two issues with which we are concerned here, first, the possibility of determining present cost of condemnation or of purchase, secondly, its probative effect when ascertained, were not before this court, were not considered by it, and were not decided.

By the unanimous judgment of courts and text writers alike, the cost of condemnation or of purchase of railroad right of way involves two ques-

tions: (a) the market value of the land taken, and (b) damage to the residue of a tract where less than an entire tract is taken. We have no hesitation in saying that there was no evidence before the court in the *Minnesota Rate Cases* of either the market value of the land taken, whose valuation was there discussed, or of the damage to the untaken residue.

"What is termed the normal value", that is, the market value, said the court, "does not satisfactorily appear" (Opinion page 450). There was no evidence in the record "of the normal value of the land in sales between private parties." The fundamental basis, therefore, of every intelligent and rational estimate of cost of condemnation or of purchase, was wholly lacking.

Not only was there entire absence of any evidence of the market value of the land, but there was a total failure to introduce any testimony showing the cost of condemnation of the lands in question. That this is so, appears from the following significant statement of the Court:

> "There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained" (Opinion page 482).

There being neither market value nor condemnation value before the Court, these absolutely fundamental and essential elements of the problem before us were not, and could not have been considered by the Court, nor could their probative or evidential value have been weighed, determined, or passed upon by the Court. The Court did not say that the present cost of condemnation or of purchase was

or was not a proper measure of the value of the carrier's lands and rights of way, because that issue was not before it, nor was there any evidence to support such an issue if it had been in the case.

(c) *The issue in the Minnesota Rate Cases was between "railway value" and "market value" as the basis of computation, and the court decided in favor of market value.*

The carriers in the *Minnesota Rate Cases* contended that in determining the value of their lands and rights of way, an artificially constructed "rail way value" should be recognized as the basis of computation. This railway value was confessedly in excess of market value and bore no direct relation to it. This Court decided that the so-called railway value is a fiction which the law does not recognize; that market value always has been, and must continue to be the true and only basis of computation which the law provides, and with which the carriers must be content. Running through the entire opinion on the subject of land values, it is repeated in varying forms of expression, that market value must control, and that "railway value" cannot be recognized. In truth the controversy in the *Minnesota Rate Cases* may properly be formulated as "Market Value vs. Railway value."

Read in the light of this controlling feature the opinion is a harmonious and consistent exposition of the reasons why market value, as contrasted with railway value, arbitrarily and artificially fixed should prevail. The specific rules for determining the cost of condemnation based upon the market value, by adding to the value of the land taken the damage to the remainder where only a part was

taken, were not considered or passed upon, nor was there any reason why the court should do so, since the legal rules and principles applicable thereto are too well established to require any elaboration Nor were those cases governed by any statute such as that out of which the present cause has arisen. Hence the language of the opinion has no bearing on the operation of the explicit mandate of Congress, that is now before the Court.

(*d*) *Statement of the facts disclosed in the Minnesota Rate Cases.*

The Railroad and Warehouse Commission of Minnesota issued two orders and the Legislature of that state enacted two laws prescribing maximum charges for the transportation by railroads of freight and passengers. Stockholders of three several railroad corporations operating within the State brought suits in the United States Circuit Court to restrain the enforcement of these orders and laws and to prevent the adoption or maintenance of the rates established by them by the railroad companies. The complainants assailed the acts and orders upon the grounds (a) that they amounted to an unconstitutional interference with interstate commerce, (b) that they were confiscatory, and (c) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. The Circuit Court referred the suits to a Special Master, who took the evidence and made an elaborate report sustaining the complainants' contention that the rates involved were confiscatory. His findings were confirmed by the Circuit Court and decrees

were entered accordingly, adjudging the acts and orders (except in the case of one railroad) to be void, and permanently enjoining the enforcement rates, freight and passenger, and their adoption or maintainance by the railroad companies.

To sustain the contention that the orders and decrees were confiscatory, the complainants gave evidence tending to show the value of the railroad properties as a whole and also the value of those portions situate within the State. The Master and the Circuit Court, in determining the value of the railroad properties, adopted as a basis the cost of reproduction new. In the case of the Northern Pacific, one of the three roads involved, the Master found the value of the portion of that system which was in Minnesota, upon the basis of cost of reproduction new, to be $90,204,545. Of this sum the amount for cost of reproduction new of lands for right of way, yards and terminals was set down as $21,024,562.90, exclusive of certain percentages. The details of this amount are as follows:

Terminal properties, St. Paul appraisement of Read, Watson & Taylor, as modified by railroad company	$7,645,100.24
Add 5 per cent for the cost of acquisition and consequential damages	382,255.01
Property acquired after appraisement	328,725.79
Minneapolis, appraisement of Elwood, Barney & Ridgeway, as modified by railroad company...	4,027,616.17
Add 5 per cent for acquisition and consequential damages	201,380.80

Property acquired after appraisement	227,737.26
Duluth, appraisement of Stryker, Mendenhall & Little	3,602,443.43
Add 25 per cent for railway value, cost of acquisition and consequential damages	900,610.85
Total value of terminals	17,315,869.45
Lands outside of terminals	3,708,693.45
Grand Total	$21,024.562.90

In this Court the appellants insisted that no more than $9,498,099.27 should have been allowed. It was contended by them that the valuation made by the Master and the Circuit Court proceeded on a wrong theory; that it was a speculative estimate of cost of reproduction; that it was wholly in excess of the market value of adjacent or similarly situated property; that it did not represent the present value in any true sense, but constituted a speculative conjecture as to the amount which the railroad company would have to pay to acquire its right of way, yards terminals on an assumption itself inadmissible, namely, that while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state, and the location, population, and activities of towns villages, and cities, were as they existed at the time of the valuation. The respondents contended that the valuation was based upon correct principles and that the value assigned to the land was correct.

(e) Complainants' method of arriving at land values.

This Court first proceeded to consider the basis for the finding in the case of the Northern Pacific, with respect to the "lands outside of terminals," that is, the right of way, and station grounds, etc., outside of the three cities of St. Paul, Minneapolis and Duluth. In the Northern Pacific case the evidence of Thomas Cooper, the Land Commissioner of that road, was adopted by the Master and the Circuit Court as such basis allowing however only 75 per cent. of the amount claimed by him. The amount so allowed was determined upon as the "fair reproduction value of the property."

The precise manner in which this principle was applied is shown by Cooper's evidence. What he did was toset down under the heading of "market value" not market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land at the time of valuation. This included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right of way. It did not, however, embrace an allowance for payments which might have to be made for improvements possibly found upon the property or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. This supposed additional outlays he undertook to estimate. For this purpose he arbitrarily multiplied the sum which in his judgment it would cost the railroad company to acquire the naked land, by

a multiplier adopted by him which in the case of agricultural lands was generally three, and the product thus arrived at was the amount set down as the value for railway purposes. The total amount thus reached by Mr. Cooper in the case of lands outside of the three terminals was $4,944,924.60 The Master regarded the multiplier used as too large and allowed 75 per cent. of the amount thus claimed, or $3,708,693.45, as the "fair reproduction value of the property." This sum was about $1,700,000 in excess of Mr. Cooper's estimate of what the railroad company would have to pay for the bare land.

The method of arriving at the value of the terminal lands in St. Paul, Minneapolis and Duluth was somewhat different. In St. Paul and Minneapolis, Cooper estimated what he thought it would cost the company to purchase these lands exclusive of improvements made upon them, severance and consequential damages and expenses incident to acquisition. These amounts were for the property in St. Paul, $7,645,100.24; in Minneapolis, $4,027,616.17. These precise amounts were adopted by the Master in his findings and to them he added 5 per cent. to cover the cost of acquisition and consequential damages, as appears by the detailed statement of allowances for land values above set forth.

With respect to the Duluth property, where the appraisement appears to have rested upon the ordinary values of real estate, the Master set forth as the appraised value $3,602,443.43, to which he added 25 per cent. or $900,610.85, "for railway value, cost of acquisition and consequential damages."

It thus appears that in every case, except the

terminal in Duluth, the basic or primary figure used was the sum which the complainants' witnesses fixed upon after such inquiries and investigations as they thought proper, to be the amount which the railroad company would be compelled to pay for the naked land at the time of reproduction without any allowance for payments which might have to be made for improvements on the property or for the consequential or severance damages or for the expenses of acquisition. It is important to observe that this basic sum is always treated as being higher per unit than the value of contiguous property. *It embraced an additional amount above the value of contiguous or similarly situated property.* The witness in terms testified that he was unable to state what on an average he had added to the true or normal market value per unit of contiguous or similarly situated property, to allow for the additional amount which the railroad company would have to pay upon the hypothesis that is was at the time of the inquiry compelled to purchase the land. The report of the case fails to disclose what would be the value of the railroad lands in any case, except in Duluth, upon the same basis per unit as contiguous or similarly situated lands. It is quite apparent from Copper's testimony that he gave no evidence on that subject. In arriving at the basic amount of what is called "railway value" it is obvious that he did not rely upon actual sales of railroad land by the company as affording a basis of value, because there had been no such sales. It is also clear that the amount paid by the company for the lands was not a factor to which any weight was given. The aggregate amount paid for lands outside of the

three terminals does not appear. The total original cost of the lands in the three cities named, appears to have been $4,527,228.76; the Master allowed as their value $17,315,869.45.

Mr. Cooper, whose standard was adopted by the Master and the Circuit Court presented the theory that the cost of reproduction was made up of several elements:

(1.) The normal or market value of the land for general purposes as determined by the market value of contiguous and similar lands, *plus* an excess over such normal value which the railroad company would pay for the naked land in case of repurchase.

(2.) In addition to the reproduction cost of the naked land thus computed the severance and consequential damages and the improvements on the land taken. These are estimated and the amount is arrived at by multiplying the figures arrived at as shown in sub-division (1) generally by 3. The product was adopted as the total reproduction cost, thus making the supposed cost of the naked land one third and the supposed consequential and severance damages two-thirds of the total whenever the figure 3 was chosen as the multiplier.

The following excerpts form Mr. Cooper's evidence found on page 446 of the report demonstrate the literal exactness of this analysis:

> Q. Therefore your judgment as to the value of the railroad property is always that it is higher than the value of contiguous property?
>
> A. Yes, yes, that is true.

Q. So that in every case what you call the market value is the value of contiguous or similarly situated property with an additional amount which a railroad company is ordinarily compelled to pay?

A. That is right.

Q. You have put into the market value the excess which a railroad pays for land?

A. That is correct.

Q. And then having determined to your satisfaction at what figure or sum you would place the market value of this property to the railroad company, as you have described, you have added another sum for severance damage, cost of improvements unnecessary to the Company, easements in abutting property and general expenses?

A. That is correct.

Q. And you have determined that in agricultural communities this second addition is shown by the use of the multiple 3?

A. I think the multiple 3 is too low and I so testified in this case.

Q. But that is what you used for the purpose of the right of way value of land through the agricultural communities?

A. That is right in this State.

Q. There is nothing in any of your exhibits which will show nor are you now prepared to state, the difference in what might be termed the normal true, ordinary market value of the lands to the ordinary individual and the sum which you have fixed as the market value to the Railroad Company if it were now compelled to purchase?

A. That is correct.

I. A summary of what was actually decided in the Minnesota Rate Cases.

This method of reproducing lands was condemned by this Court. It held that the basis of all computations must be market value; that the usefulness or adaptability of real property for railway purposes or for any other purpose is merged and swallowed up in the market value when that is once ascertained; that courts cannot assume that juries will disregard the law and render unfair verdicts where railway companies are condemning property; that it is not admissible to use an artificial "railway value," in excess of market value, as a basis, and then to apply to it an arbitrary multiplier to cover severance damages and other items in order to ascertain what the cost of reproduction would probably be, and that the law does not recognize a "railway value" as distinguished from "market value." The Court also held that the appraisements "were in substance appraisements of what was considered to be the peculiar value of the railroad right of way," that this was "an impossible hypothesis" and that railroad right of way was not property *sui generis* and so entitled to a special railway value in excess of market value. *The dominating thought of the opinion upon the subject of land values is that the theory of "railway value" in excess of market value is unsound, and that the basis of all computations must be market value.*

II. The Court fully recognizes that the condemnation cost of right of way as ordinarily understood, is a proper element to be considered in determining the value of railway lands.

It is unnecessary to do more than to refer to the universal rule that the measure of damages in a condemnation proceeding is the market value of the land actually taken, and the damage, if any, to the remainder of the tract where less than the whole is taken. If an entire tract of forty acres of land is condemned and the fair market value is $100 per acre, the damages are $4,000. If a right of way 100 feet wide is condemned diagonally across this same forty acre tract, the damages are measured by the area of the tract taken computed at $100 per acre, plus the damage to the residue of the tract. The Court must have had this in mind when it spoke of condemnation proceedings and the method of computing damages therein.

A fatal objection, in the opinion of the Court, to the estimate of cost of reproduction of land based on "railway value," relied upon by the carriers, was the fact that it was *in excess of the condemnation cost*. Their theory was that a railroad company would be compelled to pay a greater amount than would be represented by a verdict in condemnation proceedings based upon market values. This theory the Court condemned because it would not assume that a jury will act in disregard of the law.

Speaking of the carrier's estimate of the cost of reproduction, the Court said (page 450):

> "It is at once apparent that, so far as the estimate rests upon a supposed compulsory

feature of the acquisition, it cannot be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It it also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, *it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value.* It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights, and it cannot be supposed that they would be disregarded."

In other words, the carriers presented an estimate of the cost of reproduction of lands which was admittedly in excess of condemnation cost as that expression is ordinarily understood. The Court was asked to approve it upon the theory that that would be the actual cost of re-acquiring the right of way on the theory that courts and juries were likely to disregard the law and their duty, and that consequently condemnation costs could not be limited to the basis of market value. The

Court could not do otherwise than to deny this contention.

That this is the true meaning of the language employed by the Court is shown by the paragraph following that just quoted, (page 451):

> "It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be en titled to receive on its condemnation, *its fair market value* for all its available uses and purposes."

The carriers were insisting upon railway value. The Court decided in favor of market value. When the Court said that "the owner of each parcel would be entitled to receive on its condemnation *its fair market* value for all its available uses and purposes," (the Court's italics) it meant that the condemnation proceeding would be *based* upon fair market value. It cannot be for a moment supposed that the Court intended to say that in the event of the condemnation of a right of way 100 feet wide running diagonally through a farm of 160 acres, the owner would be entitled to receive only the average market value of the strip of land actually condemned, regardless of the element of damage to the residue of the tract. To do so would impute to the Court the intention to overturn the settled law of eminent domain, and to nullify the constitutional provisions of many states regulating the subject.

The Court merely meant that market value, rather than railway value, should be taken as a basis of computation.

Perhaps the Court might have said with greater accuracy that the "fair market value" would be the *basis* on which the cost of condemnation was to be ascertained, or that the owner would be entitled to the fair market value of each parcel actually taken, plus the damage to the residue where less than an entire tract was taken. Undoubtedly, this was the thought in the Court's mind. The reference to condemnation proceedings could mean nothing else.

To suppose otherwise would impute to the Court an intention to modify the universal rule controlling condemnation proceedings and to emasculate the constitutional provisions touching eminent domain.

It is easily understood why the Court employed the language above quoted without drawing a distinction between the condemnation of an entire parcel, and the condemnation of a part only. The contest before the Court being as we have shown between railway value and market value, the carriers claiming that railway value should be taken as a basis and increased by the use of multipliers and other additions to make the cost of reproduction, and the appellants taking the contrary position. The holding of the Court was that railway value was an impossible hypothesis, but that, on the contrary, market value was the sole test and should be the basis. It was, therefore, unnecessary to refer specifically to the two elements which in the aggregate constitute the damages in condemnation proceedings. The Court must have

taken for granted that they were too well known to require comment.

The use of the expression "fair market value" runs through the entire opinion. Its use in other places is in the same sense as in the foregoing quotation. For illustration, at page 455, the Court says that the company would have no ground of complaint if it were allowed a value for its lands "equal to the fair average market value of similar land in the vicinity." There also, the expression "fair average market value" is intended to indicate the basis on which the condemnation cost is to be computed. As thus understood, the entire opinion is in complete harmony with the well recognized rules of law, and does no violence to established principles. If construed otherwise, as the Commission contends it should be, it leads to the grossest injustice and patent absurdities.

There follows immediately a statement in the opinion that if property has a peculiar value or special adaptation for railroad purposes, that would be an element to be considered (citing *Mississippi River Boom Co.* vs. *Paterson*, 98 U. S., 403; *Shoemaker* vs. *United States*, 147 U. S., 282; *U. S.* vs. *Chandler-Dunbar Water Power Co.*, 229 U. S., 53), This leads to the remark: "But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained."

Of course the inquiry must be as to the fair market value of the property, *as distinguished from railway value*, and that means that we look to the fair market value as the basis for the determination of the cost of condemnation. The language of the opinion certainly does not afford authority

for the proposition that a right of way may be carved out of a larger tract upon payment to the owner of the average market value of the area within the right of way, without regard to the damage to the residue. It would manifestly disregard the deliberate pronouncements made by this Court on repeated occasions, as above shown.

It is likewise true that the question is what the owner has lost, and not what the carrier has gained; but what the owner has lost consists of his damage sustained as adjudged whenever the Court has been called upon to interpret constitutional provisions relative to the condemnation of lands for railway purposes, that is the market value of the tract actually taken, and also the damage to the residue of the tract.

The Court then proceeds to state the familiar rules in condemnation proceedings that the owner is not entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of purposes for which it is taken; or of an increase over its fair market value by reason of any added value supposed to result from combination with tracts acquired from others, so as to make it a part of a continuous railroad right of way held in one ownership, and adds the following statement, *which we conceive to be of the highest importance in this case* (page 452);

> "There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained."

The significance of this comment is at once apparent. The carriers had put forward their sched-

ules of "railway value" and the reproduction costs built upon it, which the Court had condemned because in excess of condemnation costs based on market value. It would be natural for the Court, upon reaching this conclusion, to turn to the record to ascertain if it contained evidence of condemnation costs which the Court could use as a basis of land values, in order to enable it to reach a conclusion as to the total value of the railway's property in the State, to which the test of confiscation could be applied. Evidently the Court examined the record for this very purpose. But it discovered that there was no evidence from which the amount properly allowable in condemnation proceedings could be ascertained. There was not even satisfactory evidence of the market value or normal value of adjoining lands.

The estimate of land values offered by the carriers having thus proven unreliable, and there being no evidence of condemnation costs upon which land values could be properly computed, nothing was left to the Court but to reverse and remand the case, which it accordingly did.

III. It follows that it was estimates based solely on hypothetical "Railway Value" that received the condemnation of this Court.

As before stated, "railway value" is something in excess of market value. There is apparently no standard for its determination or measurement. It is an estimate made by a valuer of what, in his judgment, it would cost the railway company to acquire its right of way, without any

other rule for its determination. It bears no fixed relation to market value, but when ascertained, is to be augmented by the use of multipliers to cover severance damages and other items. It rests upon the assumption that a railroad right of way possesses a peculiar value; that it is *sui generis,* and beyond the operation of established rules applicable to condemnation proceedings, as well as to sales between private parties. But the Court held that a railroad right of way is not immune from the application to it of established rules for the determination of its value; that in the eye of the law, a right of way is a parcel of real estate, and its value for the purposes of sale or for purposes of condemnation, is to be tested as such; that it does not constitute a class of super-property requiring special rules and special considerations. Touching the insistence of the carriers in this respect, Mr. Justice Hughes said (page 453):

> "The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgments as to what the railroad right of way was worth."

> And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist, and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right of way was conceived to be a property *sui generis*, "a large body of land in a continuous ownership," representing one of the highest uses" of property, and possessing an exceptional value. The estimates before us, as approved by the master with his increase of 25 per cent. in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical re-acquisition of the property is not controlling when we come to the substantial question to be decided.

The opinion then proceeds to formulate "the substantial question to be decided." It is in substance, whether railway value or market value shall be the basis employed in ascertaining the value of railroad right of way. This is what is said (page 453):

> "That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treat-

> ed (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void because they do not permit a return upon in increment so calculated?"

In other words these questions amount to the inquiry whether the Court is to accept railway multiples suggested by the witnesses to reach a cost of reproduction, where such basic railway value is not only in excess of the original cost of the right of way, but also in excess of the market value of contiguous and similarly situated property?

Railway value being in excess of market value, the Court very pertinently asks if this excess, which, as above stated, is to be multiplied by three or some other numeral, is thus to be permitted constantly to outstrip all neighboring lands of like character devoted to other uses.

Before answering "the substantial question to be decided," the Court paused for a moment to dispose of the contentions of the carriers that because the railway right of way is employed in the public service, therefore it is entitled to special consideration and special treatment different from that applicable to similar property owned by others. This is accomplished in the following words (page 454):

> "And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by

> the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right."

Having thus dealt with this incidental matter the Court is prepared to decide "the substantial question to be decided," whether the carriers' synthetic product, called railway value, is entitled to approval. The answer is an emphatic negative (page 455):

> "The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper rest or standard in the transactions of the business world. It is an increment which, in the last analysis, must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant."

Thus "railway value" is rejected because it is in excess of market value which must be the cri-

terion in all estimates of condemnation cost, and because there is no standard by which it may be measured or tested, but rests solely on arbitrary opinion that departs from time-honored methods of valuation generally applied. Having finally disposed of railway value as a basis for the determination of the reproduction cost of land, the Court clearly indicates that this basis should be the market value of adjoining land of similar character. It is to be constantly borne in mind that the Court here is giving its judgment adversely to railway value as a basis or computing cost of reproduction, and favorably to market value, as such basis, and that it uses the expression "market" or "normal value" in this sense. Say the Court (page 455):

> "Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for conjecural cost of acquisiion and consequential damages must be

> disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of "engineering, superintendence, legal expense," "contingencies," and "interest during construction."

Bearing in mind that the Court has now decided that railway value, which is in excess of market value, may not be used as the basis for computing reproduction cost, it proceeds to say that the true basis is the "normal market value of land in the vicinity having a similar character." Otherwise, we enter the realm of mere conjecture; that is, if we adopt some other standard or basis than market value, we are at sea without chart or compass. Therefore, railway value and the estimates based thereon, are disapproved. It is pointed out that the carrier would have no ground of complaint if it were allowed a value for its lands on the basis of the fair average market value of similar lands in the vicinity without additions by the use of arbitrary multipliers or otherwise to cover hypothetical outlays.

IV. The Denver Water Works case does not support the Commission's interpretation of the Minnesota Rate Cases.

The Commission in its decision in the Texas Midland case (page 60), refers to the Denver Water Works case (246 U. S., 178), quotes an excerpt from the report of the Special Master and draws some conclusions from the ruling of the Court, which, we submit, are misleading.

For illustration, it is stated at the top of page 61 that the Water Works Company excepted to the report of the Master, for the reason that in determining the value of complainant's lands nothing had been allowed on account of consequential or severance damage, and the exceptions were stricken by the lower Court, and that this action was affirmed by this Court. The clear inference is sought to be created that this Court denied the right to include anything in land values except the market value of adjoining lands.

This is erroneous. What did happen, as appears from the opinion of the Court, was that the Master "with the practical consent of the parties" adopted the method of appraising lands and water rights "at their present market value." If the Water Company excepted to this action of the Master, its exceptions were not considered either by the lower Court or by this Court, for the reason that the lower Court declined to hear or consider the exceptions of either party, upon the ground that the reference was by consent, and the exceptions of the Water Company in this Court were not considered because they were conditioned upon the defendant's assignments of error being sustained, when, as a matter of fact, they were overruled.

It is thus apparent in the first place that the method of valuing land adopted by the Special Master and quoted by the Commission was practically consented to by the parties, and hence could not in the nature of things be subject to review here. It is furthermore obvious that if the Water Company excepted to the application of this rule, which it probably could not do, because of its virtual consent thereto, that question was not before this Court because the assignments of error of the Water Company were as already stated, condition-

ed upon the assignments of error of the appellant being sustained.

It is not apparent, therefore, that the remark of the Commission in its opinion in the Texas Midland case (page 61), that the Supreme Court "treated as established, the propriety of estimating the utility's property on the basis of present market value as to lands" is misleading and unwarranted?

This Court did say, page 191:

> "What we have said, establishes the property of estimating complainant's property on the *basis* of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the Special Master hardly is disputed by appellants, except as they contest the items allowed for "going concern value" and for the water rights acquired by complainant and its predecessors by original appropriation."

What the Court had said was that the method adopted by the Special Master "was with the practical consent of the parties."

Furthermore it referred to "the *basis* of present market values as to land," which means, as we have always contended, that the basis of all calculations is market value.

It is also to be noted that the method adopted by the Master, says the Court, "hardly is disputed by appellants," the appellants being the city and others on that side of the controversy. Upon no theory of the case could they have any objection to the method adopted by the Special Master of valuing the lands. The only party that could object would be the Water Works Company, which was the cross-appellant, whose assignments of error were not passed upon.

DEC 8 1919
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM—1919.

No. 413.

THE UNITED STATES OF AMERICA on the relation of Kansas City Southern Railway Company,

Plaintiff-in-Error,

vs.

INTERSTATE COMMERCE COMMISSION

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AS *AMICI CURIAE* ON BEHALF OF NUMEROUS RAILROAD COMPANIES

W. G. BRANTLEY,
SANFORD ROBINSON,
LESLIE CRAVEN,
of Counsel,
Presidents' Conference Committee.

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In the Supreme Court of the United States

OCTOBER TERM—1919.

No. 413.

THE UNITED STATES OF AMERICA, on the relation of The Kansas City Southern Railway Company,
Plaintiff-in-Error,
vs.
THE INTERSTATE COMMERCE COMMISSION

BRIEF *AMICI CURIAE*.

Statement

An order having been entered, granting permission to file a brief as *amici curiae*, this brief is filed by counsel on behalf of the Presidents' Conference Committee, an organization of the executives of the railroad companies, representing the ownership of approximately 224,000 miles or 85 per cent. of the railroad mileage of the country.

The Interstate Commerce Commission, in the enforcement of the Act approved March 1, 1913,

amendatory to the Act to Regulate Commerce, and providing for the valuation of the properties of carriers subject to said Act, has declined, in the case of the Kansas City Southern Railway, to ascertain and report the present cost of condemnation and damages or of purchase of the carrier lands of said company, basing its declination upon the ground that it is impossible as matter of law to ascertain and report the present cost of condemnation and damages or of purchase of the carrier lands of any railroad company. The interest of the Presidents' Conference Committee in the pending case arises by virtue of its representation in matters involving the valuation of the properties of the various railroad companies embraced within its organization, and the said committee believing that the conclusions reached by the Interstate Commerce Commission as stated are erroneous, it has sought, through its counsel, permission to file a brief on the question involved, and such permission being granted, this brief is now submitted.

Argument.

Point 1. The Valuation Act plainly requires the investigation, ascertainment and report of the present costs of acquisition of railroad lands.

The duty of the Commission with relation to the execution of the Valuation Act is prescribed by its terms. There is no dispute as to what

the Act prescribes. It requires, in plain and implicit language, the investigation, ascertainment and report of the present cost of acquisition and also the present value of railroad lands. These requirements are found in paragraph "First," in the language: "Said Commission shall ascertain and report in detail as to each piece of property owned or used by the said common carrier for its purposes as a common carrier, * * * the cost of reproduction new, * * *," and paragraph "Second," which applies solely to land, providing that: "Such investigation and report shall state in detail, and separately from improvements, * * * the present value * * * and separately the * * * present cost of condemnation and damages, or of purchase * * *."

The Commission makes no denial of these requirements. It has admitted in its decision in the Texas Midland case, 1 Val. Rep. 54, that the Act requires the investigation, ascertainment and report of the present cost of acquisition of railroad lands. The Commission says (page 54): "* * * the direction in paragraph entitled 'Second' for the ascertainment of the present cost of condemnation and damages, or of purchase, in effect calls for a finding as to the cost of reproduction of these lands."

On page 163, the Commission says: "This, however, is not of much practical importance, for paragraph 'Second' requires the Commission to report, if not the cost of reproduction, at least what amounts to the same thing."

On page 164, the Commission says:

> "The right of way of a carrier is frequently donated, but in so far as the carrier must acquire this by purchase or condemnation the cost generally exceeds the acreage value of the lands taken. This is partly due to the peculiar shape of the piece acquired and partly to other causes. This excess cost to the carrier is a thing of importance in the actual production of its railroad, and the carrier claims that it ought to be given weight in the estimate of reproduction. Evidently this was the fact for which Congress intended to inquire. What did it cost and what would it now cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?
>
> If this construction is correct, the Commission is required to report as to the operative lands of a carrier the following facts:
>
> 1. Original cost.
> 2. Present value.
> 3. Cost of procuring right of way in excess of acreage value at the time of dedication to public use.
> 4. Cost of procuring right of way at the present time in excess of present acreage value."

The Commission thus recognizes that the Act requires the ascertainment of the present

cost of acquiring the carrier's lands, and that this cost of acquisition "generally exceeds the acreage value of the lands taken." By "acreage value of the lands taken" it means their value, for example, upon the basis of the value per acre of the 160 acre farm through which the right of way passes, and from which its area is carved. The Commission, refusing to estimate these costs of acquisition in excess of this "acreage value," finds a "present value" which is limited solely to the so-called "acreage value." The refusal of the Commission to find the higher cost of acquisition and its reasons for restricting its investigation to the so-called "acreage value" are explained in detail in the *Texas Midland* decision (1 Val. Rep. 53). In defining the "present value" which it reports for carrier lands, it says:

> "Present value is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

On page 167, it says:

> "Present value as reported by the Commission is *nearly synonymous* with market value. What is done is to ascertain the number of acres of carrier land, to deter-

Italics ours.

> mine the market value of similar land adjoining or in the immediate vicinity *per acre* and to apply that price to the number of acres."

The Commission thereby reports a "value" derived by applying to the acres of land owned by the carrier, a market value determined from the present acreage market value of adjacent and adjoining lands in the sizes and shapes in which those adjoining lands exist and which, by reason of the fact that they are devoted to other than railroad uses, are not similar in size and shape to the lands owned by the railroad. The railroad lands, and particularly rights of way, are peculiar in that there must be a continuity of title in strips of narrow area located with particular reference to conditions of topography and community development. Being devoted to a peculiar use requiring such areas in shapes and sizes dissimilar to those of the lands devoted to ordinary agricultural or industrial purposes, railroad lands cannot be acquired upon the basis of the market value of land in the shapes and sizes usable for such agricultural or industrial purposes. The universal experience of the carriers in the acquisition of their lands demonstrates this fact, and its recognition is found throughout the authorities in which the legal principles underlying the acquisition of such lands are outlined. Not only must the carrier pay for the area which it secures, but additional amounts must be paid for the damages to the adjacent property

Italics ours.

from which the railroad areas of peculiar shapes are taken, due to the injury done to such property both by the severance of the land taken and by the inconvenience and annoyance caused by the operation of trains once the railroad is constructed. The carrier thus acquires not only the title to the area actually taken, but certain rights in the adjoining lands which are analagous to easements, by virtue of which the carrier has the right in the construction and operation of its railroad to damage continuously the adjoining property. The Commission in the excerpt above quoted from the *Texas Midland case* admits these things. The Commission in its decision also says (1 Val. Rep. 1, 170):

> "It cannot be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased materially exceeds the acreage value of the land taken. Previously to the decision of the Supreme Court in the Minnesota Rate Cases it seems to have been understood by many commissions and valuators that the proper method of determining the present value of the operative lands of a carrier was to inquire what it would cost to acquire those lands upon the basis of present prices. For the purpose of determining the excess of such cost over acreage value many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which

> varied for rural right of way from 150 to 300 per cent., being less in case of city lands."

These excess costs arise from the fact that the carrier acquires not only the acreage actually occupied by his right of way, but in addition must pay amounts for the damages done to the residue of the tract of which the land taken formed a part, thereby securing rights, analogous to easements, over the adjoining property. In *U. S.* vs. *Grizzard*, 219 U. S., 180, 183, 184, the Court said:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing of course, injury due to the use to which the part appropriated is to be devoted. Thus in Sharp vs. United States, 191 U. S. 341, 353, damage resulting to adjacent but distant parcels was denied because there had been no actual appropriation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the use of that taken, to that untaken of the same tract. Upon this distinction the court said: 'Upon the facts which we have detailed we think the plaintiff in error was not entitled to re-

> cover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract.' To the same effect see Cooley's Constitutional Limitations, pp. 565-566."

From these facts it clearly appears that railroad lands normally are secured at a cost of acquisition which is in excess of the market value of the land taken; that these costs arise by virtue of established legal precedents pursuant to which the carrier is required to incur them; that the Commission has recognized the fact of the existence of such costs, and that the Act intends to require and does require their reporting, but that the Commission refuses to report them.

The reason for the incorporation of these requirements in the Valuation Act lies in a number of considerations. The Act requires the investigation, ascertainment and report of the *value*, not only of the land, but of all the property of the railroads, and requires in addition a study and report of certain important facts which are relevant to the ques-

tion of value. The value of railroad property is a question of fact. As was stated in the Minnesota Rate Cases (230 U. S. 352): "It is not a matter of formulas, and there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." The Court, in defining the scope of this inquiry as to the facts, quoted the language of *Smythe* vs. *Ames* (169 U. S. 466), which has become a cornerstone of valuation precedent:

> "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

An examination of the legislative history of the Valuation Act shows the intent of the framers of the bill to require the ascertainment and reporting of all these facts pertaining to value

which were mentioned by the Court, each one of which, among numerous others, is specified in its provisions, and each of which constitutes a prescribed field of inquiry.

One of the facts pertaining to value which is mentioned by the Court in the language above quoted, is the "present as compared with the original cost of construction." The "present cost of construction" must be complete, otherwise it is misleading. Its completeness necessarily requires the inclusion of the present cost of acquiring the carrier lands as well as its other property. Clearly the cost of acquiring those lands is as important as the cost of constructing the roadway and buildings upon them. It cannot be doubted that what would have to be paid today to acquire those lands, in accordance with the present day practises and the experience of the carriers in so doing, and pursuant to the principles of law governing such acquisitions and the amounts payable in such cases, is not only *relevant* to the present value of such lands, but would in the normal case be a predominating and controlling consideration. Clearly such costs would be more controlling than the alleged "acreage value" now determined by the Commission, and which it admits is incomplete in that there are excluded certain items of cost covering elements of value which normally and almost inevitably attend such purchases. The reason is therefore clear why Congress included this important requirement in the Valuation Act. With-

out such evidence, the basis for determining valuation would be essentially defective.

Aside from the necessity of the ascertainment of the cost of acquiring railroad lands with relation to the determination of value, the intent of Congress was obvious also to insure the marshalling of all of the information, statistics and data, in which it was thought there could be found a foundation upon which to rest a scientific regulation of various railroad problems. Information was desired as to what it would cost to produce this property today under modern conditions, thus affording information relative not only to the question of value, but thought to be possibly desirable for such purposes as affording a check of the reasonableness of the carrier's plant accounts, the fairness of capitalization, the adequacy of depreciation annuities, and other kindred matters. The complete present costs of constructing the railroads, as distinguished from a partial estimate of such costs, is essential for such purposes.

Point 2. Since the language of the Act requires that the Commission ascertain the cost of acquisition, the Commission cannot question the wisdom of Congress, nor can it refuse to perform the duty imposed unless such performance is absolutely impossible.

The Valuation Act orders an investigation, ascertainment and report of definitely specified matters. A large part of the Act is a bill of specifications detailing with exactness the facts which are ordered to be investigated, ascertained and reported. Under these circumstances, several propositions would seem to be manifest, and not subject to reasonable question. In the first place, the Commission has no discretion as to whether it shall perform the duties imposed. While judgment may be exercised by it, as the expert agency to whom these duties are delegated, in making its determination within the specified issues, it is not for the Commission to substitute its judgment for that of Congress, and to question the wisdom of Congress in legislating as it did, and as a result of a difference of opinion to refuse to enter the fields of investigation which Congress prescribed. The language of the Act is mandatory. It is the mandate of sovereignty. It is the law of the land and made so by the legislative branch of the government, within the proper exercise of the functions of that branch. It is a direction to an inferior and subordinate agency of the

state, which is itself the mere creature of the state, which exercises its authority only as a result of the certain prescribed and delegated powers and duties which give it life. One of the duties imposed by the sovereign state upon its servant is prescribed by the Act as the determination of a certain specified fact. It is not within the scope of the powers of the Commission to test the wisdom or expediency of that delegation of duty and authority.

In the second place, if from the very nature of things, the duty imposed is impossible, in that it cannot be accomplished by anyone possessing the utmost skill and knowledge, the Commission is excused from the performance of its duty. But in this relation, impossibility is to be distinguished from impracticability or from inadvisability. Questions of expediency, inconvenience or hardships are not relevant to the issue. It matters not how much effort the ascertainment will require, what expenditures are necessary, or what may be done with the results or conclusions once they are derived. If the estimate of the cost of acquisition can in any possibility be made, any considerations going to the hardship or difficulty of making the ascertainment or of the worth of the results when ascertained, are not material to the issue. The Commission's refusal to follow the mandate of the law can only be justified if it is established that in the very nature of things the Commission cannot make the estimate of probable costs of acquisition which the Act requires, which

incapability arises because such costs of acquisition under any method or theory do not lie within the limits of rational determination. This means impossibility of rational determination under every hypothesis consistent with reasonable valuation theory and legal precedent. The following cases are pertinent:

The Harriman, 9 Wall., 172.
Beebe vs. *Johnson*, 19 Wend., 500.
Hare on Contracts, 639.

We contend that it is practicable to ascertain such costs, that they can be reasonably ascertained, and that their ascertainment is necessary to the ascertainment of the value of the railroads and the execution of the Valuation Act.

Point 3. The ruling in the Minnesota Rate Cases considered as a ruling upon a principle of constitutional law does not affect the duty of the Commission to perform the acts specified in the Valuation Act.

Prima facie the conditions which we have heretofore outlined point so clearly to the propriety of compliance by the Commission with the law, that we may with profit next examine the grounds of the Commission's refusal. Its refusal is based primarily upon its interpretatation of the decision of the Court in the *Minnesota Rate Cases*, 230 U. S. 452. This ground is stated by the Commission in its

answer in this proceeding and is the foundation of the decision of the Commission in the *Texas Midland* case. It is the Commission's position that the position of the Court in the *Minnesota Rate Cases* establishes that the ascertainment of the present cost of condemnation and damages or of purchase of railroad lands has no lawful nor rational basis.

In this connection, the fact must not be overlooked that the refusal of the Commission to comply with the Act is *entire*. It declines to report the present cost of acquisition of the railroad lands, even where that ascertainment can be made with complete accuracy. For example, it would seem clear that where the actual acquisition of such property had been so recent that the conditions obtaining at the time of purchase were substantially those of the date of valuation assumed by the Commission in making its report, the "present cost of condemnation and damages or of purchase" would be substantially the same as that original cost. Therefore, the findings required by the Valuation Act could be made accurately and without the exercise of any assumptions. The Commission, however, refuses to make any findings of the cost of acquisition of railroad lands under such circumstances. It is alleged in the amended petition, and the allegation is not denied, that certain lands were acquired by the plaintiff for right of way purposes shortly before the date of valuation through condemnation proceedings, at an actual cost of $180,000, but that the Commission has reported

the so-called "present value" of these lands at $60,000 (Record pages 34, 35).

The Commission thus declines to report the present costs of acquisition. The decision of the Commission in the *Texas Midland Case* and in the cases decided subsequent thereto is absolute and unqualified (*Winston-Salem Southbound Railway Company*, 1 Val. Rep. 187, *Kansas City Southern Railway Company*, 1 Val. Rep. 223). It therefore appears that the position of the Commission, founded upon the decision of the *Minnesota Rate Cases*, assumes that that decision established as a matter of law the impossibility of the ascertainment. In view of the reliance of the Commission upon the doctrine of the *Minnesota Rate Cases*, we may therefore properly direct ourselves to the consideration of the relationship of that decision to the duties of the Commission prescribed by law.

The *Minnesota Rate Cases* did not involve the Valuation Act. They were submitted for decision before the Act was passed. The crux of the issue presented in these cases was the constitutionality of state-made rates, which the carriers asserted were confiscatory in that they did not permit a fair return upon the value of the property devoted to public service. The Court at the beginning of its discussion reiterated the established principle of law that the rates must pay a reasonable compensation upon the fair value of the property devoted to public service. Whether confiscation had been effected by the regulation under attack, depended upon

the relationship of the returns under the prescribed rates to the value of the property used. This was the announcement of a substantive rule of constitutional law. The Court then said that this value was to be determined as a question of fact:

> "In determining whether that right (i. e., the right of receiving 'just compensation') had been denied, each case must rest upon its special facts. * * * The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts." (Page 434.)

The Court, having laid down as a proposition of constitutional law that value was the test, thus defined the issue of fact and considered in detail the testimony regarding the cost of acquisition and "railway value" of the lands in question. The Court said:

> "The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidated facts must be proved." (Page 452.)

It decided that the necessary facts were not proved. It pointed to certain defects in the proof, and repudiated the value founded upon

this evidentiary basis. At the conclusion of the Court's discussion it uses language which clearly indicates that its consideration is confined solely to the issue of fact. It said:

> "Finding this defect in the proof, it is not necessary to consider the objections which relate to the sources from which the property was derived or its mode of acquisition. * * *" (Page 456.)

Value as a question of fact, was thus passed upon in the light of the evidence submitted, but there is nothing in the opinion indicative of a holding that the present cost of acquisition of the railroad lands in question, properly ascertained, was not relevant to the issue of value.

From these considerations it is entirely clear that the Court did not decide that the test of confiscation, as a question of substantive *law*, is not the value of the carrier lands, based upon a consideration of their estimated cost of acquisition among other relevant facts, provided that this cost was ascertained on other bases than those hypotheses which the Court condemned. It would have been inconsistent with the entire trend of judicial precedents upon this question, and with the opinion of the Court itself, as expressed in the language which we have quoted, for the Court to have prescribed as a rule of *law* that the utility was not entitled to a return upon a value ascertained by a consideration of such relevant facts as an

estimate of the present cost of acquisition, since the principle has been long and firmly established, as the opinion itself states, that the test of confiscation in a case involving rates is value, the determination of which is a question of fact. The error of the Commission lies in the fact that it takes dicta from the discussion of issues of fact and elevates it to the position of a pronouncement of a substantive rule of constitutional law. This alleged substantive rule, that the carrier is entitled to a return only upon the value of its lands determined upon the basis of the acreage value of the adjoining tracts of dissimilar size and shape and without any consideration of the cost of acquisition of the carrier's lands, is inconsistent with the fundamental proposition of constitutional law first announced, to wit: that the carrier is entitled to a return upon the fair value of its property, which, as a question of fact, is to be determined by a consideration, not of any one class of information, but of *all* of the relevant facts.

In the case of *Cohens* vs. *Virginia*, 6 Wheaton, 264, Chief Justice Marshall said:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of Marbury vs. Madison.
>
> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

> If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.
>
> The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. (Pages 399–400.)

The maxim of the law is so familiar to the courts and lawyers that a statement of it is seldom necessary. Occasionally when lawyers in the zeal of advocacy seek to press too far mere language or dicta the courts allude to this well known rule. For example, see the *Kansas City Southern case,* 231 U. S., 423, where it is said:

> "The expressions quoted were properly employed with respect to the questions then presented for decision." (Page 447.)

Recently the Circuit Court of Appeals of the Eighth Circuit found it necessary to fully restate the rule and apply it. See *Northern Pacific Railway Company* vs. *North American*

Telegraph Company, 230 Fed., 347, where it is said:

> "As the facts upon which the opinions in the cases cited rest are materially different from those in the case at bar, it is indispensable to a just appreciation of these decisions and of the opinions in these cases, and of their bearing upon the crucial question in the case at bar, that in their examination and discussion these familiar rules announced by Chief Justice Marshall be borne constantly in mind." (Page 355.)

The Circuit Court then repeats the language of Chief Justice Marshall in the case of *Cohens* vs. *Virginia*, above quoted.

Even had the Court held in a rate case, as a matter of law, that the cost of acquisition of the carrier lands could not be used to determine their value, is such a holding upon such an issue and in such a case relevant to the duties prescribed by the Act of Congress? The impossibility, because of a declared rule of law in a case involving the issue of confiscation by rate regulation, of using such information in such a case, cannot relieve the Commission from its duties under the mandate of Congress. As heretofore suggested, Congress has ordered the marshalling of a variety of information thought to be desirable as the groundwork for possible methods of solu-

tion of various phases of the railroad problems. Assuming that this erroneous construction of the decision of the Court in the *rate* case in question is proper (which we emphatically deny), it has been urged that there are other and diverse uses of such facts and information in critical lines of inquiry and investigation, aside from that of testing whether rate regulation is confiscatory. The impossibility of the lawful use of such facts in one of various fields of investigation is no justification for refusing to do what Congress ordered done, and which may be useful for other important purposes. The desire of Congress, and its judgment as to the matters regarding which it desires information, is supreme. It is not within the power of the Commission as a servant of the government to substitute its desire or judgment for that of the government. Irrespective of the relevancy of such information in a case involving the issue of confiscation by rate regulation, Congress had the power to require the ascertaining and reporting of such information, or of any other information, which it desired.

An examination of the *Minnesota Rate Cases* discloses that there was properly repudiated a value based upon assumptions which were so inconsistent with law and fact, that the results derived were entirely excessive and unreasonable. But this criticism of the conclusions of fact based upon such assumptions cannot justify the refusal of the Commission to make such estimates based upon assumptions which are consistent with law and fact.

In the first place, it is clear from the language of the opinion as a whole, as we have already suggested, that the consideration of the cost of acquisition of railroad lands in that case was a consideration of the *facts* upon which the finding of value of the court below was based. Having opened its discussion with a statement of the fundamentals upon which it proceeded, by defining the issue of the ascertainment of value as a judgment based upon a proper consideration of all relevant facts, the proof was considered, the opinion stating that "the constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved." After a critical analysis of the testimony, and because of specified defects in the proof, the Court concluded:

> "By reason of the nature of the estimates, and the points to which testimony was addressed, the amount of the fair value of the company's land cannot be separately determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive."

Clearly the estimated cost of acquisition of railroad land is a fact relevant to the determination of its value. The decisions of the courts indicate that in a preponderance of cases, the cost of reproduction of the physical prop-

erty other than land has been recognized as a controlling factor in the determination of value, and the relevancy of such cost is universally recognized. It cannot be seriously contended that this court could have attempted to prescribe any rule for the ascertainment of value, as a question of fact. Its intent to do so was specifically denied when it said:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of *formulas*, but there must be a reasonable judgment, having its basis in a proper consideration of *all* relevant facts." (434.)

Clearly, therefore, the Court did not hold that the ascertainment of value could be limited to any certain designated facts. The language above quoted negatives any possible attempt to restrict the scope of consideration to any certain class of information, or to exclude from consideration any facts which are relevant, provided that they are properly established on dependable and logical grounds.

The Court was therefore merely passing upon the questions of fact as those questions were presented by the testimony which had been offered. The general language used in this consideration must be interpreted, having in mind the point to which the Court addressed itself. The methods which were condemned were the methods in issue, and used in that

case. An examination of the decision shows that there is continual reference to the specific testimony which the Court was considering, and that any general observations which the Court made can refer only to the specific problem then under consideration. The present cost of acquisition of lands now owned is an estimate resting on certain assumptions. In the range of the possible assumptions which in the exercise of judgment, might be adopted, the Court of necessity could consider only those which were in issue in the testimony then under consideration.

For example, examination of the opinion discloses (Page 450), that the Court condemned the offered estimate of acquisition costs, in that it rested upon a "supposed compulsory feature of acquisition," and contemplated "that the company would be compelled to pay more than fair market value" and thus would be deprived of its lawful right of the exercise of the powers of eminent domain under the established principles of law controlling that exercise. The Court likewise condemned the assumption used, that the company would be bound to pay an excessive "railway value of its property," and pointed to the fact that this assumption was directly in conflict with the established principles of law, enunciated in condemnation cases and restricting the allowance to the market value. The Court specifically stated (Page 452) that there is no evidence before us from which the amount which would "*properly* be allowable in such condemnation proceedings can be ascertained,"

thereby manifestly implying that had the estimate been based upon correct assumption, and had there appeared what "would properly be allowable in such condemnation proceedings," such market value determined in accordance with legal precedents would have been properly the basis of the fixing of value. Similarly, the Court said (Page 452) that the contemplation of the complete removal of the road and a readjustment of its values because of such obliteration, was "to indulge in mere speculation." So again the Court condemned the assumption that "all the difficulties which might be imagined as incident to such a 'reproduction' were considered," and that the "increase sought for 'railway value' *in these cases* * * * is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world." (Pages 453–455.)

Applied to the testimony there under consideration, and the important parts of which were quoted in the Court's opinion, such criticism of the evidence then before the Court was unquestionably fair. But as the basis for the refusal to consider facts based on reasonable and lawful assumptions and resting upon known criterions, not founded in imaginative conjecture, but finding a test and standard in the current and common business transactions of the railroad companies generally in the purchase of lands, it wholly fails.

Specific criticism by the Court of specific testimony cannot foreclose the investigation or ascertainment of facts in that same field of thought, if that investigation or ascertainment is prescribed on the basis other than the one condemned, and avoiding the vice specified. To so hold is to destroy the fundamental proposition announced in the opinion that value is to be derived by a consideration of *all* relevant facts, and makes impossible the formation of a sound judgment since the basis of judgment is not as broad as the subject considered.

In the Commission's decision of this question in the *Texas Midland* decision (page 54) it states the necessity of assumptions and states what these assumptions shall be. In that decision, it erroneously assumes the necessity of the maximum assumptions, and states that the Act in requiring the cost of reproduction of the carrier lands requires the assumption that the property in question "is to be taken as non-existent." It states that it is sophistry to contend that the lands of the railroad can be reproduced "without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the *mental obliteration* of the railroad itself." The Commission then discusses, as decisive of the issue, the language of the *Minnesota Rate Cases*, in which was condemned the use of assumptions based upon inadmissible and speculative hypotheses, as though such hypotheses were the only possible hypotheses, and the Commission repudiates evidence

introduced by the carrier upon the ground that its method was not distinguishable from that condemned in the *Minnesota Rate Cases*. That the Commission kept continually in mind assumptions of the most extreme sort, such as those condemned in the Minnesota Rate Cases, is clear from the following language (page 61): "Not alone do the uncertainties that we have referred to surround what would be the conditions of ownership, of improvement and of value of nearby property and of general industrial development, but there can be no certainty as to what land would have to be acquried at a cost to the carriers upon reproduction or a present acquisition," and the Commission then proceeds to discuss the difficulty of ascertaining what percentage of the carrier's land would be donated to it by communities or individual owners. Then the Commission states its inability to determine with accuracy what conditions would exist if these maximum assumptions were made, which contemplate the entire "mental obliteration" of the railroad itself, and the changed conditions of the ownership of adjoining property, the changed status of the improvement of the property adjoining the railroad and of the community generally, the different value of the nearby property and a new status of the general industrial development of the community, resultant from the complete elimination of the railroad from the community and the removal of its influence upon such general conditions as the conditions of ownership, value, improvement and general

community industrial development. (Texas Midland decision, page 61.) We feel that Congress could not have intended to require the determination of an estimated cost of acquisition based upon any such processes. But can the statement by the Commission of the possible exercise of unreasonable judgment in the making of an estimate effect a nullification of the law requiring it to make such an estimate in the exercise of reasonable judgment?

The Commission in its erroneous interpretation of the opinion of this court in the *Minnesota Rate Cases* has gone so far as to assume that the opinion in that case condemned the cost of reproduction method as applied to lands as being an "impossible hypothesis." In the Brief of the Commission now before the Court it is said, page 10:

> "This Court clearly states, in substance, that the estimate of present cost of condemnation or damages, or of purchase, which appellant is asking the Court to compel the Commission to make, is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in the *Minnesota Rate Cases*, in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis."

This Court in the *Minnesota Rate Cases*, page 453, said:

> "Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth."

The hypothesis here referred to was that presented by the specific assumptions upon which the witness proceeded in the specific testimony which the Court then had under consideration. It cannot be assumed that reference could be made to the hypothesis presented by other assumptions, or by assumptions based upon such reasonable and legal grounds, as would avoid the vices which were the basis of the Court's criticism of the specific testimony which it considered.

Careful consideration of the opinion points clearly to the fact, furthermore, that the "impossible hypothesis" to which the Court refers was, in fact, not the determination of the cost of acquisition, but the determination of a "railway value." The Court said on page 452:

> "The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied, and when the cost of reproducing the property may be ascertained with a proper

> degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

What the opinion condemned as an "impossible hypothesis," was the assumption of the existence of a peculiar railway value which the appraisers sought to determine. The court said of this character of value, that it "must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world."

The opinion, page 445, contains this statement:

> "In the latter part of 1906 the State notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report."

The entire opinion in so far as it relates to land values is devoted to a criticism of the requirement thus made by the State that "value for railway purposes," or "railway value" be reported. This character of value, the court condemned as an "impossible hypothesis."

The reasoning of the Commission that it cannot determine the cost of reproduction of lands because it has no way of ascertaining or fixing the proportion of the railroad lands

which would be donated in a reproduction, finds no support in the opinion of this Court in the *Minnesota Rate Cases*. This Court there declared, page 454:

> "The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

The fundamental inquiry which the Commission is to make under the Valuation Act is as to the value of the property of the railroad, including the value of its lands. In the determination of the "present value" of carrier lands the fact that the carrier originally paid little or nothing for them is of no consequence. It is not the original cost of the lands of which the carrier may not be deprived without due process of law; but it is their value at the time of the deprivation. The estimated present cost of acquiring the lands is one of the elements named for consideration in the determination of their present value, and in the ascertainment of such present cost of acquisition the fact that certain of the lands may have been donated is entirely irrelevant. In paragraph "Second," the Act requires the investigation and report of the "present cost of condemnation and damages or of purchase." This provision contemplates the ascertainment of the cost of acquiring by condemnation or purchase the land in

question. It contemplates this acquisition at a *cost.* It does not contemplate acquisition by donation *free* of cost.

Point 4. The nature of the problem of ascertaining the present cost of acquisition of railroad lands.

The "present cost of condemnation and damages or of purchase" of the lands of the carrier is necessarily an estimate. It is the *present* cost of acquiring something which is already owned, and which cannot, therefore, be actually again acquired. The requirement of ascertaining this cost therefore contemplates a cost under conditions which are contrary to the existing fact, and requires a theoretical ascertainment of the cost of property, the title of which is assumed for purposes of the calculation to be not in the carrier, but in someone else from whom acquisition is to be made. Congress therefore necessarily contemplated the making of assumptions, when it delegated this theoretical task to the Commission. Congress did not designate what the assumptions should be. That determination is delegated to the Commission under the natural expectation that the assumptions will be fixed on a basis so consonant with practical experience that the results derived will afford information of the present cost of establishing these properties and of what the investment under present day conditions would be as compared with the actual or original

investment, thus affording information pertaining not only to the question of value, but desirable for various other purposes contemplated by Congress, and in the determination of which information regarding what investment would be required to establish these properties today, and under present conditions, is desirable.

Necessarily, there is latitude in establishing these assumptions. The subject does not permit of the didactic pronouncement of fixed rules. Valuation is not an exact science. Value and estimated costs lie in zones of reasonableness, and are matters of sound judgment based upon a consideration of the controlling circumstances. The determination, however, is not one of mere conjecture. It is a matter controlled by sound judgment. Congress contemplated that the entire ascertainment should be made in the exercise of such judgment, and with conscientious skill. Estimated costs are of frequent service in the ascertainment of value. Congress could require the making of skilled estimates.

The position of the Commission is not consistent with this broader view of the problem, but is affected by a literal interpretation of certain dicta in the opinion of the *Minnesota Rate Cases*, of which a fetish is made, and which are even quoted almost in verbatim form in its amended answer. The position is based primarily upon the proposition that the assumptions condemned in that opinion are those which it should apply in the exercise of its skilled

judgment, and that the determination of these estimated costs is not possible without the indulgence of that conjectural reasoning which was there properly condemned and upon which condemnation the refusal of the Commission to obey the law is based.

As just stated, within the latitude of the possible assumptions resting in judgment, Congress contemplated that the Commission would exercise sound judgment. The problem being the estimate of the present cost of acquiring what the carrier owns, and therefore, in fact, need not acquire, there is necessitated, at least, the assumption of a changed condition to the extent of the status of title. This would seem to be a minimum of assumption. In the widest range of assumption, as distinguished from this minimum, it would be possible to assume the non-existence of the road, that it has never been built, that the community development which has resulted from its existence has not occurred, that the resultant value now existing in the community could not therefore exist, and that under this mental obliteration of the road, there would be necessary a hypothetical readjustment of the community values, which are now the result of its existence. The Commission assumes the necessity of such speculation, and predicates its refusal upon the impossibility of doing the obviously unreasonable. Need skilled judgment, however, go to this degree?

The error of the position of the Commission is that it recognizes no degrees of reasonableness,

and places all estimates of the cost of acquisition of railroad land on the plane of the estimates which the Court criticised. Where Congress has ordered the reporting of facts in the exercise of reasonable judgment, the Commission now refuses to act because of the fact that the Court, in the criticism of certain testimony, has condemned estimates which were not based upon reasonable judgment. Where the Court criticised certain assumptions in a certain case as unwarranted, the Commission now refuses to enter the field of the investigation involving any assumptions, not on the ground that a reasonable judgment cannot be formed on a minimum assumption, but that to enter such field it must adopt assumptions justified neither by fact nor law, and which for those reasons the Court condemned. This position is plainly fallacious. It is founded upon a misconception of the duties imposed by the Act, the applicability of certain *obiter dicta* to the problem in question, and the scope of judicial precedent.

Among the decisions of courts and commissions may be found language critical of estimates of the cost of reproduction of public utility property other than land. This criticism is directed merely to the facts of the particular case. Fantastic overheads have been included, based on highly theoretical and imaginative conceptions of how the property would be reproduced, and every contingency and difficulty of construction which could possibly be met in the building of the property,

has been included and reflected in excessive costs. The Commission, relying upon the decisions of such courts and commissions in passing upon those issues of fact, might as well refuse to report the cost of reproducing the buildings and other structures of the railroads, as to refuse here to report the cost of acquisition of the railroad lands. Judicial criticism of the proof of the facts relied upon by the parties in litigation involving the issue of the confiscation of property by rate regulation, cannot establish a lawful basis for the refusal of the Commission to ascertain rightly certain facts, when that action is ordered by Congress. If the Commission is justified in refusing to estimate the cost of acquisition of these lands, because it is possible to indulge in unreasonable conjecture and to form erroneous judgments, it may with equal justification refuse to make any estimates, since all estimates involve the use of judgment in the making of the necessary basic assumptions.

The Commission is now engaged in making an estimate of the present cost of reproduction of all of the railroads in the United States, it being assumed that all of these roads would be reproduced between the years 1914 and 1920. When the work is completed, it will purport to show for all of the railroads in the country the cost of reproduction during that period of their property. This estimate is necessarily based upon a foundation of assump-

tions. The assumptions employed by the Commission and the methods of cost ascertainment are explained in the opinion in the Texas Midland case (pages 11, *et seq.*, 108, *et seq.*). But it is not possible for the human mind to grasp the status of the conditions affecting the costs of construction, the price of materials, land values, and the wages of labor, which would exist in this country during those years were all of the railroads of the country to be obliterated during that period and then reconstructed. The business life of the nation would be disorganized. The increase in the demand for materials and labor would place their cost on so high a plane as to make the reconstruction of these properties a financial impossibility, even were their reconstruction a physical possibility (and it is not a physical possibility). The reproduction hypothesis therefore, if applied to a theoretical and logical finality, brings the estimator to problems which are beyond rational determination. This difficulty is avoided by the use of common sense, by approaching the problem in a spirit of scientific inquiry, and by the use of that judgment necessary to make the results of the work of practical weight. The determination of the cost of acquisition of railroad lands is susceptible of a like solution.

Point 5. The present cost of condemnation and damages or of purchase of railroad lands can be readily and accurately ascertained in accordance with established legal precedents.

The problem of the ascertainment of the present cost of acquisition of railroad lands is merely the application of the principles which have become well established by legal precedents governing the rights of the parties in cases involving the acquisition of such property. As stated in an earlier portion of the brief, what Congress has required is an estimate of the cost of obtaining property, the title of which is already held. Assumptions must therefore be made, and the judgment of the Commission must be formed based upon these assumptions, and with a careful statement of them in order that the report will disclose the exact nature of the fact reported. A brief consideration of the nature of the problem and the legal precedents which are applicable to it leads to a conclusion that an estimate of the cost of acquisition of railroad lands can be made with accuracy, with the use of reasonable assumptions which in no way impair the accuracy of the results, and that the law can thus be complied with.

We have heretofore suggested that the cost of securing railroad lands can be resolved into two general elements. The first of these is the acreage value of the area which is actually taken

for railroad purposes. The second is the element of damage to the adjoining lands which the railroad does not take. The former is merely ascertainment of the value of the area of which the owner is deprived. The latter is an ascertainment of the *diminishment* in value of the lands of which the owner retains title and possession. The issue in each instance is an issue of value, the former being the value of the land taken, the latter being the decrease in value of the land not taken. Both of these determinations are of matters which lie in sound judgment based upon a consideration of the facts. Both of these problems are commonly presented to juries in cases which are common in every court of the land. These determinations are made pursuant to the established precedents which protect the owner of property against the taking or the damaging of any part of it. The damages, as the cases heretofore cited disclose, consist usually of those injuries due to the division or separation of the owner's land, and the severance of its parts by virtue of the alienation of title to particular strips desired for the right of way, and in addition, of those injuries arising from the use of the lands taken for railroad operation, and of such character as the annoyance and inconvenience caused by noise and smoke and the hazards which arise from the possibility of injury to property by fire and to person by accident. This law is clearly defined and well

established. The following authorities are in point:

Lewis, Eminent Domain (Third Edition) Chapter XX.
U. S. vs. *Grizzard*, 219 U. S., 180, 183-4.
Lincoln vs. *Commonwealth*, 164 Mass., 368, 41, N. E., Rep. 489.
R. I. & E. I. Ry., vs. *Gordon*, 184 Ill., 456, 56 N. E., 810.

Clearly it cannot be said that any insuperable difficulty is presented by the ascertainment of these items of value and damages as to property which is not yet acquired or which is in the course of acquisition, since that problem is one which is commonly solved by juries in condemnation cases. If there is any proper basis for the refusal of the Commission to make the ascertainment which is thus commonly made by courts and juries, the refusal must proceed from the fact that there is a difference between the problem presented by the ordinary condemnation case and that which arises in the determination of the cost of property which is already acquired. The reason must be that the difference in the conditions existing in the problem which confronts the jury, and the problem which confronts the Commission, as to property now owned by the railroad, presents an insuperable obstruction.

The refusal of the Commission to comply with the Act, is, as has been said, entire. It

declines to report the cost of acquisition of railroad lands in any case. It is clear that in cases where the property has in fact been acquired recently and the lapse of time has produced no conditions making the problem presented by the Act different from that which is presented to the juries, nothing prevents the Commission from forming the same judgment which a jury would form. Thus where the actual acquisition of the property has been so recent that the conditions obtaining at the time of purchase were substantially those at the valuation date assumed by the Commission in making its report, the "present cost of condemnation and damages or of purchase" would be substantially the same as that original cost. Therefore the findings required by the Valuation Act can be made without any assumptions other than that the carrier has not title. The judgment in such an instance does not differ from the judgment which a jury would make without hesitation.

The Commission, however, declines under such circumstances to ascertain the present cost of acquisition. It is alleged in the amended petition, and it is not denied in the Commission's answer, that certain lands were acquired by the plaintiff for right of way purposes shortly before the valuation date, by the means of eminent domain and at an actual cost of $180,000, and that the Commission has reported the so-called "present value" of these lands at $60,000 (Record, pages 34,

35). This "present value," as above explained, is merely the acreage value of the area taken, upon the basis of the acreage value of the adjoining property, and with no consideration of the damages to the adjoining property represented by a difference between this partial cost and the total price required by the law to be paid. It cannot be seriously urged that the Commission in such a case cannot comply with the Act, or that the present value of such lands can justifiably be reported by the Commission as less than would be determined by a jury in such condemnation proceedings, in accordance with the principles of eminent domain which are firmly established as a part of the law of the land. The Commission, by reporting as the "present value" of such property a mere fraction of the cost of securing it, covering only part of the elements of value which attach to the property and for which the carrier under established law was required to pay, by refusing to comply with the terms of the Act which require the reporting of these complete costs and of all elements of value of the lands, has proceeded in clear disregard of the terms of the Act and of the basic law governing the cost and value of such property. The injustice of this position, and the injustice of reporting such misleading information, is manifest when it is recognized that the attitude of the Commission results in its reporting as the "present value" of lands which the carrier has just

acquired, a sum which is one-third of the amount which the carrier was required to pay under the laws of eminent domain as the cost of acquisition of the property, which cost Congress has ordered to be reported, and which cost the Commission can report, since it is certainly capable of forming the same judgment which in fact the juries in the recent condemnation proceedings have just formed.

The foregoing considerations point conclusively to the fact that the ascertainment legally can be made, where the property has been recently acquired. Does a lapse of time between the date of its original acquisition and valuation date make impossible the legal ascertainment of its present cost of acquisition and damages or of purchase? Here again it is clear that the problem which the Commission declines to investigate is commonly investigated and solved by the courts and juries. The Commission refuses to comply with the Act because of the supposed chaotic condition of facts attendant upon the assumption of the obliteration of the railroad and the annihilation of the community development which has arisen because of the existence in the community of the railroad facility. But the making of this estimate of the cost of acquisition of lands which are now held and are now used for railroad purposes does not necessitate any such impractical process. If the problem were presented to a jury, the court would be impressed by no such difficulty in instructing the jury as to how it should proceed.

The Court would not in reliance upon the *Minnesota Rate Cases* come to the Commission's conclusion that because of the impossibility of indulging in these speculative hypotheses said to be referable to no criterion or standard of reason, the farmer would be restricted to the mere market value of the area taken, determined upon the basis of the acreage value of the adjoining farm, and with no consideration nor regard for the elements of value and the items of damage in excess of this meager amount. This exact problem is commonly presented to juries under instructions embodying the established principles of law, and decided by such juries, and no such theoretical or hypercritical objections are, or can be, directed to the procedure. In such cases, the amount which the land owner recovers is not, and lawfully cannot be, limited to the mere acreage value of the area taken, and the cost of acquisition which the railroads are paying is not lawfully confined to the partial cost which the Commission now reports and beyond which it finds it lawfully impossible to go. Such cases are of numerous varieties and are common in every court in the land. They are presented in the instance of railroads which have completed their construction upon the railroad lands in question, and which are now under operation, in such circumstances as these: It frequently occurs that the title to the land employed for right of way purposes is not secured in advance of the actual occupation of the property and the construction of the line thereon. The lands are

occupied by mere license or under adverse possession, and thereafter it is necessary to obtain the legal title in condemnation proceedings brought for that purpose. In other cases, a right is secured by leasehold or by license and the necessity subsequently arises after occupation and operation for the carrier to convert its leasehold or license into a fee. In other cases, a title is secured merely from a life tenant and it is necessary to condemn the rights of the remainderman. In other cases, where a title has been secured by the carrier from an owner, the holder of an outstanding mortgage forecloses the owner's title, and the carrier therefore must bring condemnation proceedings to perfect its title. Cases of the failure of title for any one of a great variety of possible defects and in which the carrier must again secure title by condemnation proceedings, are common in every state. In these cases the courts have not found themselves confronted with an insuperable problem, which prevents the owner of the land which is sought to be condemned, from securing the full protection of his legal rights and just compensation for the deprivation of his property and of every element of its value. The present cost of acquisition which Congress has ordered to be reported, is accurately and justly determined in accordance with the law. The law in such cases is merely an application of the general principles of the law of eminent domain to the problem at

hand. In this regard, attention is directed to the following authorities:

15 Cyc. 722–3.
Lewis, Eminent Domain (Third Edition) 705, and the cases cited.
Sutherland on Damages, Paragraph 1083.
Faulk vs. *Missouri River & N. W. Ry. Co.*, 132 N. W. 233 (S. D.)
County of Blue Earth vs. *St. P. & S. C. R. R. Co.*, 28 Minn., 503.

The cases heretofore cited indicate that the elements of the cost of acquisition are of two general classes, the acreage value of the land taken, and the damages due to severance and operation to the remainder of the owner's property. The Commission has reported the first element in its report of the so-called "value." The carrier does not dispute the accuracy or reasonableness of the sums reported. This partial determination is one of the elements upon which a jury under such circumstances would be required to make a determination. The carrier now insists that the process shall be completed. The Act so requires. As we have heretofore indicated, the position of the Commission, in that it bases its refusal upon an interpretation of the *Minnesota Rate Cases*, is clearly erroneous in that it involves a misconception of the doctrine of those cases and the proper scope of judicial precedent. In fact, the Court in the *Minnesota Rate Cases* manifestly implied after its criticism of the erroneous

legal assumptions upon which the testimony was based, that had there appeared the costs of condemnation determined in accordance with established legal principles those facts would have been worthy of consideration. It is not to be assumed, as the Commission does assume, that the determination of value or cost of the property, is to be conducted on a basis apart from the established principles governing the determination of the value of the identical property where the right of eminent domain is exercised. The following language from the *Minnesota Rate Cases* is significant: (230 U. S., 451):

> "It is urged that, in this view, the company would be bound to pay the 'railway value' of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its *fair market value* for all its available uses and purposes. (*United States* vs. *Chandler-Dunbar Water Power Co.*, decided May 26, 1913.) If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. (*Boon Company* vs. *Patterson*, 98 U. S., 403; *Shoemaker* vs. *United States*, 147 U. S., 282; *United States* vs. *Chandler-Dunbar Co.*, *supra*.) *But still the inquiry would be as to*

the fair market value of the property, as to what the owner had lost, and not what the taker had gained. (*Boston Chamber of Commerce* vs. *Boston*, 217 U. S., 189, 195.) The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership. (*United States* vs. *Chandler-Dunbar Co., supra; Boston Chamber of Commerce* vs. *Boston, supra.*) *There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.*" (Italics ours).

In the pending case, however, the Commission plants itself squarely upon the proposition that the testimony which would be properly received by a court in a case involving the identical problem which is before the Commission, would not be competent evidence of value. The amended petition of the carrier alleges (Record, page 35):

"Whatever may have been the difficulties inhering in or incident to the manner of

proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it, in the following manner, to wit:

Relator accepts, as a basis for such ascertainment, the present market value of its lands as found and determined by the respondent, and assumes that each parcel of land, having reverted to adjoining owners as it would at common law upon its abandonment, would be re-acquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation. Where an entire parcel is thus acquired the cost of its acquisition will be its market value as determined by the respondent as aforesaid, plus certain incidental costs, such as court costs, and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken as determined by

the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent, plus the incidental costs as aforesaid."

The Commission in its answer (Record, page 26) denies that the evidence thus tendered is competent proof of the present cost of condemnation and damages or of purchase. We submit that this position is conclusively wrong.

Respectfully submitted,

W. G. BRANTLEY,
SANFORD ROBINSON,
LESLIE CRAVEN.

December 8, 1919.

No. 418.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Defendant in Error.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1919

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA, AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY, ~~appellant~~,
v.
INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, ~~appellee.~~
} No. 413.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

Plaintiff in Error, hereinafter called appellant, a common carrier subject to the act to regulate commerce, requests the court to issue a writ of mandamus commanding defendant in error, hereinafter called the Commission, to receive certain evidence which it has refused to receive in a proceeding now pending before it, entitled *In the Matter of the Valuation of the Property of the Kansas City Southern Railway Company et al.*

By section 19a of said act, commonly called the valuation act of March 1, 1913, the Commission is

required, among other things, to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the act to regulate commerce, and paragraph entitled "Second" of the valuation act reads:

> Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

To the extent the commission is required by said paragraph to ascertain and report separately the "present cost of condemnation and damages or of purchase in excess of original cost or present value" of the lands included in the rights of way, yards, and terminals of common carriers, it has never been able to comply therewith. It has, however, permitted appellant and other carriers, including the Texas Midland Railroad, to introduce in proceedings before it a large volume of evidence, the effect of which was to prove what had previously been demonstrated by this court in its decision in *the Minnesota rate cases* (230 U. S. 352) namely, that it is impossible to comply with this requirement of the valuation act, because no

lawful or reasonable basis upon which to rest an estimate of such cost can be discovered.

After the commission had rendered its decision in the *Texas Midland case* (1 I. C. C. Val. Rep. 1), in which evidence of the character mentioned had been submitted to it for consideration, appellant asked for and was given permission to introduce in the *Kansas City Southern case* before an examiner of the commission at Kansas City evidence which appellant claimed would tend to establish the present cost of condemnation and damages or of purchase of the lands included in the rights of way, yards, and terminals of the railroad used by appellant as a common carrier in serving the general public. At the hearing before said examiner, appellant introduced such evidence to the extent that it was then prepared to do so, all of which was received by the examiner. Thereafter, however, appellant asked the commission to permit it to introduce additional evidence of the same character and this request was denied for the reason stated by the commission in its decision in said *Texas Midland case,* whereupon appellant brought this action and asked for a writ of mandamus as above stated.

In the Supreme Court of the District of Columbia appellant filed a demurrer to the answer of the Commission, which was overruled, and upon appeal the ruling of the Supreme Court was affirmed by the Court of Appeals. From these rulings appellant appeals to this court.

ARGUMENT.

I.

To estimate the present cost of condemnation and damages or of purchase of lands included in appellant's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

The valuation act was approved by the President and became effective on March 1, 1913. At that time there were pending in this court, on appeal from the Circuit Court for the District of Minnesota, *The Minnesota Rate cases* above mentioned, wherein an attempt had been made to estimate the present cost of acquiring the lands included in the rights of way, yards, and terminals of certain common-carrier railroads. To this method of procedure, which this court characterized as an attempt to apply the cost-of-reproduction method in determining the value of said lands (id. 450), and to the result thereof the appellants excepted, and in stating and sustaining the exception this court, speaking through Mr. Justice Hughes, said:

> It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of "cost of reproduction"; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right of way, yards, and terminals, on an assumption, it-

self inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the State, and the location, population, and activities of towns, villages, and cities, were as they are now. (Id. p. 444.)

* * * * *

* * * It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market values of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it can not be sup-

posed that they would be disregarded. (Id. 450–451.)

* * * * *

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. * * * (Id. ~~542.~~ 452)

* * * *

The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered, The railroad right of way was conceived to be a property *sui generis,* "a large *body of land in a continuous ownership,*" representing one of the "highest uses" of property and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

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That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. * * * (Id. 453.)

* * * * *

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can not properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar lands in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calcu-

> lated on that value, which were embraced in the items of " engineering, superintendence, legal expenses," " contingencies " and " interest during construction." (Id. 455.)

It will be observed that this court entertained the opinion that an estimate of the present cost of acquisition of the lands included in the right of way, yards, and terminals of a carrier could be made only upon the theory that the railroad of the carrier would be removed before the estimate would be made, and it is apparent that no other theory would be tenable. The court points out that upon the assumption of the nonexistence of the railroad it is impossible for anyone to describe either the conditions that would exist or the exigencies of the hypothetical owners of the property, and says in emphatic language that an attempt to estimate what would be the actual cost of acquiring the right of way under such circumstances would be to indulge in mere speculation. In other words, this court says that what appellant is asking the court to require the Commission to do can not, as a matter of law, be done. The court, however, does not stop here. It proceeds to demonstrate why such an estimate can not be made. It shows that the uses and values of lands in the vicinity of the railroad are largely the result of the construction and operation of the railroad; that it would be impossible to determine the extent to which such uses and values have been so influenced, and that to assume that they would not be affected if the railroad were removed, and

base upon that theory an estimate of reacquiring the lands, or its equivalent, an estimate of the present cost of condemnation and damages, or of purchase, would be improper and unjustifiable and produce a result which could not be accepted as evidence by a court. This court clearly states, in substance, that the estimate of present cost of condemnation and damages, or of purchase which appellant is asking the court to compel the Commission to make is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in *The Minnesota Rate cases,* in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis.

As shown in the answer herein, the evidence introduced before the Commission in connection with the valuation of the lands included in appellant's railroad establishes that at the time the railroad was constructed a portion of said lands was donated to, and another portion purchased by, appellant, and that appellant obtained title to still another portion through condemnation proceedings. It is evident that, upon the assumption of the removal of the railroad and its reproduction, it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by appellant, or the portion thereof appellant would have to acquire title to through condemnation proceedings.

It is further apparent that the removal of the railroad and its immediate reproduction would not damage in any manner or to any extent any of the lands adjoining or adjacent to the railroad or the owners of such adjoining or adjacent lands.

It is also clear that to determine, upon the assumption of the removal of the railroad, that the title to the lands included therein would revert to or be vested in the owners of said adjoining lands, would be unjustifiable and improper. In this connection the Commission states, by way of illustration, that chapter 8 of article 6532 of the Statute Laws of the State of Texas, which is the law in force at the present time in that State, provides as follows:

> The right of way secured or to be secured to any railway company in this State, in the manner provided by law, shall not be so construed as to include the fee simple estate in lands either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation.

II.

The word estimate is erroneously applied to an opinion expressed which has no reasonable foundation upon which to rest.

It is said the contention that it is impossible to estimate the present cost of condemnation and

damages or of purchase is unsound; that such estimates have been made in the past, and that what has been done once may be done again. This court, however, has demonstrated in *The Minnesota Rate cases, supra,* that the so-called estimates were not estimates in fact within a proper definition of that term, because they had no reasonable foundation upon which to rest. It expressed the view that before such an estimate could be made the railroad, in imagination at least, must be removed, and pointed out the unreasonableness of assuming that if such removal should take place no changes in the values now existing would result. In this connection it said: "It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed?" (Id. 451.)

III.

The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do.

It is further contended that the language in said paragraph entitled "Second" of the valuation act shows that Congress intended to require the Commission to ascertain and report separately the present cost of condemnation and damages or of purchase, and that for this reason it must attempt to do so. In this connection, however, we do not deem it necessary to make a lengthy argument because a

well-known maxim is that the law never requires the impossible.

In *Silsby Manufacturing Company* v. *City of Allentown* (26 Atl. 646) it was held that "The requirement that proposals to furnish a city with materials needed shall be advertised for need not be complied with where the thing needed is part of a patented article which can be bought at only one place." In support of this holding the court said: "The law does not insist on what is impossible or absolutely useless."

If the court reaches the conclusion that on account of matters herein set forth it would be impossible to discover any lawful or reasonable basis upon which to rest an estimate of the present cost of condemnation and damages or of purchase of the lands included in appellant's railroad it will not issue a writ of mandamus in accordance with appellant's request.

IV.

The meaning of paragraph entitled "Second" of the valuation act is not entirely clear.

Thus far we have been discussing matters herein upon the assumption that the meaning of paragraph entitled "Second" of the valuation act is clear, but we are obliged to admit that this might reasonably be regarded as a violent assumption.

It has been said that the latter portion of this paragraph calls for the original and present costs of acquisition, exclusive of the value of the land

taken at the time of its acquisition by the carrier; but, on the other hand, it has been argued that the acquisition costs called for include the value of the land taken.

It is also contended that in its language in *The Minnesota Rate cases* above quoted this court was speaking of the present cost of acquisition, including the value of the land taken, and not of the present cost of acquisition exclusive of such value.

According to our view, however, these differences as to interpretation are of no importance whatever. The matter of consequence in this connection is that this court expressed the view that an estimate of the present cost of acquisition could be made only by indulging in mere speculation, and, with this as a premise, held that an estimate so made could not properly be used in determining the fair present value of the carrier's lands.

V.

The decision of this Court in The Minnesota Rate cases is directly in point and should be given controlling influence.

Notwithstanding the plain language used by this court in its decision in *The Minnesota Rate cases,* it has been contended that the decision has no application in a case of this kind, because it was rendered in a case where the fair average of the normal market value of lands similar to the lands included in the

rights of way, yards, and terminals of the carriers had not been shown.

In some instances this argument would perhaps have force, but in this instance there is no necessity for resorting to inference in order to determine what the court intended to, and did, decide. As above shown, in advance of announcing its decision, the court stated the question it intended to decide, and then decided that question in plain and unambiguous language. Also it will be seen that the court represented that question to be the substantial question presented for determination, which, of course, it was.

A contention exactly like the contention of counsel for the carriers, above mentioned, was made in the case of *Chicago & North Western Railway Company* v. *Smith* (210 Fed. 632), decided on January 20, 1914. Up to the time of final hearing in the *Chicago & North Western case,* both parties—that is, the State of South Dakota and representatives of the carrier—had proceeded upon the theory that it was proper to attempt to estimate the present cost of acquisition of the carrier's lands and use that estimate in determining the fair present value of the lands, but on final hearing the State objected to the estimate and such use thereof upon the ground that the decision of this court in the *Minnesota Rate cases* had shown the making and use of the estimate to be improper. In sustaining the contention of the State in this regard, the court,

speaking through District Judge Willard, and after reviewing the pertinent evidence, said:

> From this evidence the company argues that it is unfair to say that for a strip of land 100 feet wide through the middle of a 160-acre farm it should be allowed no more as the cost of reproducing it than the price per acre if the whole farm were to be bought; that it is a matter of common knowledge that, if a private individual wanted to buy such a strip, it would cost him much more per acre than the value per acre of the whole farm.
>
> It is true that the evidence in this case does differ from that in the *Minnesota Rate cases,* and there is much force in the company's argument. But the defendant's claim in this respect is disposed of by what the Supreme Court, in the *Minnesota Rate cases* (230 U. S. on page 455, 33 Sup. Ct. on page 763, 57 L. Ed. 1511), said:
>
> "The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items

> of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'"
>
> I, accordingly, adopt the valuation placed upon these lands by the State before any multiplier is used, * * *. (Id. 639.)

In pointing out the difference concerning evidence of market value in the *Minnesota Rate cases* on the one hand as compared with the Chicago & North Western case on the other, statements of District Judge Willard were as follows:

> * * * Nowhere in that case did the market value of contiguous lands appear. That does appear in this case, both in the evidence of the State and in that of the company. (Id. 638.)

To the same effect see *L. & N. R. Co.* v. *Railroad Commission of Alabama* (208 Fed. 35, 42–44) and *Ann Arbor R. Co.* v. *Fellows et al.* (236 Fed. 387, 392). In the latter case, the court, speaking through Sessions, district judge, said:

> * * * The valuation placed upon the right of way and station grounds, exclusive of all improvements thereon, is $397,104, to which sum has been added more than 14 per cent thereof for so-called "overheads." This basic valuation has been reached by applying to the right of way without improvements the estimated values of adjacent lands, including all buildings and other improvements. It is sufficient to say that this method of computing values and the practice of add-

> ing "overheads" to actual values are contrary to the letter and the spirit of the rule laid down by the Supreme Court in the Minnesota Rate cases (230 U. S., 352) * * *.

In its decision in the *Texas Midland case*, supra, the Commission shows several instances where State authorities have placed a like interpretation upon the decision of this Court in *The Minnesota Rate cases* and have refused to apply the cost-of-reproduction method in determining the value of lands used by common-carrier corporations in serving the general public. (Id. 61.)

VI.

This Court has approved the Commission's interpretation of the Court's decision in the Minnesota Rate cases.

In the case of *City and County of Denver* v. *The Denver Union Water Company* (246 U. S. 178), this court had occasion to, and did, pass upon and approve an interpretation of its decision in *The Minnesota Rate cases* which had been made by a special master and approved by the District Court for the District of Colorado. In this connection the master said:

> The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. (*Minnesota Rate cases*, 230 U. S. 352, at 449–456.) It follows from this rule that the original cost of the lands is not

necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance damages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question, in my judgment, always is, What is the present market value of similar lands in the same locality, and not what are these lands worth now to the water company for the purposes for which they are now used? (*Texas Midland case*, supra, p. 60.)

After reviewing several matters involved in the case, this court, speaking through Mr. Justice Pitney, announced its conclusion concerning the special master's aforesaid interpretation of its de-

cision in *The Minnesota Rate cases.* In this connection the court said:

> What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. (Id. 191.)

The method of procedure adopted and followed by the Commission in determining the present value of lands included in the rights of way, yards, and terminals of common carriers is described by it in its decision in said *Texas Midland case* as follows:

> Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use.
>
> Nothing is included for the expense of acquisition, nor for severance damages, nor for interest during construction. (Id. 53.)

It will be observed that the Commission is acting in accordance with the decision of this court in *The Minnesota Rate cases* as interpreted by the court itself in the *Denver Union Water Company case,* and if the Commission should act instead in accordance with the method of procedure appellant is asking this court to compel it to pursue it would com-

mit thereby an error of law. If the Commission should make estimates of the present cost of condemnation and damages or of purchase of appellant's common-carrier lands, notwithstanding that no reasonable or lawful basis upon which to rest such estimates can be discovered, and then consider and give weight to the estimates in determining the value of appellant's property for rate-making purposes it would necessarily result that the value thus fixed could not be sustained in court.

VII.

Appellant's contention that the Commission may properly base estimates of present cost of condemnation and damages or of purchase upon the present market value of the lands involved, as estimated by the Commission, is unsound.

Appellant says it has accepted the estimate of the present market value of its lands made by the Commission, and that therefore the Commission, using this estimate as a basis, can easily find the present cost of condemnation and damages or of purchase. The unsoundness of this proposition, however, is readily observable. In finding the present market value of appellant's common-carrier lands, as measured by the "fair average of the normal market value of lands in the vicinity having a similar character", the Commission must of course consider conditions as they now are, including the existence of the railroad, but in estimating what it would cost to reacquire such lands, that is, the re-

production cost, or the present cost of condemnation and damages or of purchase, of the lands, the Commission would have to treat the railroad as nonexistent and speculate, enter into the realm of mere conjecture, as to what the market value of the lands would be under such circumstances. This is necessarily true, first, because it is impossible to reproduce a thing which is in existence, and second, because it would be improper for the Commission to assume the nonexistence of the railroad and "at the same time that the values that rest upon it remain unchanged", as stated by this court, as above shown, in the *Minnesota Rate cases*. It is also true, as stated by this court in said cases, that an attempt to estimate what would be the conditions of ownership of said lands or the exigencies of the hypothetical owners thereof, upon the assumption that the railroad were removed, would be an attempt to accomplish the impossible.

VIII.

Appellant's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation, and is not justified by the facts.

For the purpose, evidently, of indicating that its rights have not been properly protected appellant avers that it paid $180,000 for lands the present market value of which as estimated by the Commission is only $60,000, and that the cost of reproducing its lands and those of its associated companies

would be more than twice as much as the sum the Commission has included as their present value in its tentative valuation. When we compare these averments with appellant's assertion that it has accepted the present market value of its lands as estimated by the Commission, it is apparent that the injury appellant is talking about is based upon its belief that when the commission fixes the ultimate value of its properties for rate-making purposes, or for some other purpose, it will include therein as the value of appellant's lands only their present value, as measured by the fair average of the normal market value of similar lands in the same vicinity. This belief, however, is necessarily based upon speculation, and is not justified by the facts, because it is simply appellant's conjecture concerning action to be taken by the Commission, if taken at all, in the future. Up to the present time the Commission has not fixed for any purpose the ultimate value of appellant's common-carrier property, or the ultimate value of any other common-carrier property, and when it does so it will of course have to consider and give proper weight to, not only the present value of the lands as measured by the fair average of the normal market value of lands in the vicinity having a similar character, but also the amount of money paid by the carrier for the lands and all other pertinent facts and circumstances. In *Smyth* v. *Ames,* 169 U. S. 466, in announcing its conclusion concerning the matters to be considered

in fixing an ultimate value for rate-making purposes this court, speaking through Mr. Justice Harlan, said:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the orginal cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. * * * (Id. 546–547.)

Appellant does not aver, and it could not truthfully aver, that the Commission has refused to permit it to show the amount of the investment made in its common-carrier lands when they were acquired and dedicated to the service of the public, and while it avers that it paid $180,000 for lands the present market value of which was estimated by the Commission as only $60,000, it carefully refrains from comparing the total investment made in all its common carrier lands with their present value, as measured by the fair average of the normal market value

of lands in the vicinity having a similar character. If in the future the Commission fixes, for a particular purpose, the ultimate value of appellant's common-carrier properties and includes therein as the value of its lands less than the amount invested in the lands at the time they were acquired and dedicated to the service of the public, appellant will be free to challenge the validity of the Commission's action, but we respectfuly submit that until that time arrives it will have no standing in court in a case like the one now under consideration.

In its brief in this case in the Court of Appeals appellant said: "Neither the effect of the land reproduction schedule when once ascertained nor the use to be made of it, can be considerd by the court in this proceeding."

If these assertions of appellant are correct it necessarily follows, we submit, that the court can not comply with appellant's request for a writ of mandamus; because, if appellant is unable to show that it will sustain a legal injury if the writ is not issued, it can not establish its right thereto, and it goes without saying that unless the court may consider the effect of the land reproduction schedule and the use to be made thereof, it can not determine whether such an injury will result from the Commission's refusal to receive and consider the evidence, so-called, which is in question here.

IX.

Appellant is asking the Court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others.

Notwithstanding its admission that the Commission has correctly estimated the present value of its common-carrier lands, as measured by the fair average of the normal market value of similar lands in the same vicinity, and without attempting to show that this value is less than the amount of money invested in the lands when they were acquired and dedicated to the service of the public, appellant is trying to induce the court to assist it in securing a greater value by compelling the Commission to use, in valuing the lands, what is known as the cost-of-reproduction method. The mental route traveled by the Commission in reaching conclusions concerning values of lands is the same regardless of the purpose for which the lands are used, but while appellant is contending that the Commission should use the cost-of-reproduction method in valuing its common-carrier lands it does not advance a like claim concerning lands owned by it and used for purposes other than those of a common carrier. This means, if it means anything, that appellant is contending it is entitled to a special railway value, that is, a value of its common-carrier lands in excess of the amount invested in them and beyond the value of similar property

owned by others, solely by reason of the fact that they are used in the public service.

In this regard the method of procedure appellant is endeavoring to compel the Commission to adopt and follow is exactly like the procedure of the Circuit Court, which was condemned by this court, in the *Minnesota Rate cases, supra,* where pertinent language of the court was as follows:

> The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the Master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right-of-way was conceived to be a property *sui generis,* "a large body of land in a continuous ownership," representing one of the " highest uses " of property

and possessing an exceptional value. The estimates before us, as approved by the Master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; * * *.

* * * * *

* * *. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the

activities of the community. For an allowance of this character there is no warrant. (Id. 453, 454-455.)

X.

Appellant misconstrues the paragraph of the Valuation Act with which it is asking the Court to compel the Commission to comply.

Appellant's brief in this case in the Court of Appeals contains a paragraph which reads: "That certain of relator's lands were acquired by donation presents no difficulty in the way of ascertaining their present cost of condemnation and damages or of purchase." In support of this conclusion appellant pointed out that, as to structures, the Commission estimates the cost of reproduction regardless of the fact that some of them were donated to the carriers originally, and then said: "But two questions are presented; first, what lands, rights of way and terminals did the relator own or use for the purpose of common carrier, and secondly, what is the present cost of condemnation and damages or of purchase of those lands? The provision is not ambiguous. There is no room for speculation or conjecture as to what lands are involved, because the requirement of the statute operates upon *all* lands, whether originally acquired by purchase or condemnation, or gift or by operation of the statute of limitations or in any other conceivable manner."

It is true that the Commission estimates the cost of reproducing common-carrier structures, but this can be done, because the market prices to be paid for the materials which enter into the structures do not depend upon the places in which the structures are to be located or upon the circumstances and conditions surrounding such places. In attempting to estimate the cost of reproducing common-carrier lands, however, the estimator is immediately confronted with difficulties which are insurmountable. Of course the lands could not be reproduced, and in order to estimate what it would cost to reacquire them it would be necessary to know what the conditions of their ownership and the exigencies of their owners would be if the railroad were not there, and, as stated by this court in the *Minnesota Rate cases, supra,* neither of said elements is capable of rational ascertainment. The pertinent language of the court was:

> * * *. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? * * *. (Id. 451.)
>
> * * *. The assumption of its non-existence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right-of-way, supposing the

railroad to be removed, are wholly beyond reach of any process of rational determination. * * *. (Id. 452.)

But even if it could overcome these difficulties, the Commission would still find it impossible to make the estimates in question. It will be observed that in and by the first part of said paragraph entitled "Second" the Commission is required to find the original cost and present value of common-carrier lands, and that having done this it is required by the latter portion of the paragraph to state in detail the present cost "of condemnation and damages or of purchase in excess of such original cost or present value." This is not a call for the present costs of acquisition in the aggregate; it is instead a call for the present costs of condemnation and damages in one sum and the present costs of purchase in another sum, and in order to determine either of said sums it would be necessary to know how much of the land would be donated to the carrier, how much it would have to purchase, and the portion thereof it would have to acquire through condemnation proceedings. To the extent that donations were made it would be unnecessary for the carrier to prosecute condemnation proceedings and make purchases, and no one will claim that, especially where the sum paid for the land itself is not included, the cost of acquiring it by purchase is as great as, or even approximates, the cost of obtaining title to it through condemnation proceedings.

It is a matter of common knowledge that when the railroads of this country were constructed a very large portion of the lands included in the rights of way, yards and terminals thereof was donated to the carriers, and that only a comparatively small portion of said lands was acquired by the carriers through condemnation proceedings. Under these circumstances, and for the reason that if a person were compelled to speculate as to what would happen in the future he would naturally resort to a study of what had happened in the past, we think appellant's contentions that, for the purpose of estimating the cost of reproducing the railroads, it would be proper and lawful to assume that, at the time of reproduction, the lands included therein would be worth as much per acre as they are at the present time; that they would be owned by parties other than the carriers, and that the latter would have to obtain title to them in every instance through condemnation proceedings prosecuted against such owners, are clearly unsound.

The speculative costs appellant is endeavoring to secure the advantage of are costs it never did incur and never will, because no stretch of the imagination is sufficient to justify the conclusion that such costs can ever be incurred by anybody. Nevertheless, appellant insists that unless it is accorded such an advantage, and the Commission is compelled to make the estimates in question and use them in valuing appellant's property, its rights under the Constitution of the United States will be violated.

On the contrary, however, we respectfully submit that such an advantage could not be accorded to the appellant and other common-carriers without depriving those who pay for common-carrier services of the right to have the charges therefor based upon the fair value of the property used by the carriers in performing the services. In other words, the advantage appellant is contending for would, if granted, constitute a legal and unconscionable injury to the general public.

XI.

The real difficulty.

In said brief in the Court of Appeals, under the heading of "The Real Difficulty," appellant indulged in considerable speculation concerning the reasons which prompted the Commission to deny it the advantage it is endeavoring to obtain, and expressed the view that one reason for such denial was the conviction of the Commission that, in requiring it to ascertain and report separately the "present cost of condemnation and damages or of purchase" of common-carrier lands, Congress acted unwisely.

Of course the Commission repudiates the intimation that it has in this case based, or that it ever bases, action taken by it upon its opinion concerning the wisdom of Congress as manifested by the provisions of any law it may enact.

In this connection, however, the Commission states: That the valuation act was passed on March

1, 1913; that the decision of this court in the *Minnesota Rate cases* was handed down and made public on June 9, 1913; that prior to said June 9 the lower courts and some of the state commissions had proceeded upon the theory that it was proper to attempt to apply the cost-of-reproduction method in determining the present value of common-carrier lands, and that while said theory was being advanced and acted upon favorably, and before the unsoundness of that theory had been demonstrated by this court, Congress inserted in said act the requirement here in question.

Under these circumstances it seems reasonable to believe, and the Commission does believe, that if the publication of said decision had preceded the passage of the valuation act said requirement would never have existed, because it feels certain Congress would have endeavored to act in accordance with the principles of law as announced by the court of last resort.

The action of the Commission complained of by appellant, however, is not based upon this belief, but is based instead upon the Commission's conviction that compliance with said requirement is, as a matter of law, impossible.

For the reasons above set forth we respectfully submit that the appeal in this case should be dismissed.

P. J. FARRELL,
For Defendant in Error.

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or the difficulties involved in so doing, and that a railroad company whose interests were affected was entitled to the writ of mandamus. P. 187.

Reversed.

THE case is stated in the opinion.

Mr. Louis Marshall and *Mr. Samuel W. Moore*, with whom *Mr. Samuel Untermyer* was on the brief, for plaintiff in error.

Mr. P. J. Farrell for defendant in error:

To estimate the present cost of condemnation and damages or of purchase of lands included in plaintiff in error's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

In the *Minnesota Rate Cases*, 230 U. S. 352, this court entertained the opinion that an estimate of the present cost of acquisition of the lands included in the right of way, yards, and terminals of a carrier could be made only upon the theory that the railroad would be removed before the estimate would be made, and it is apparent that no other theory would be tenable. The court points out that upon the assumption of the nonexistence of the railroad it is impossible for anyone to describe either the conditions that would exist or the exigencies of the hypothetical owners of the property, and says in emphatic language that an attempt to estimate what would be the actual cost of acquiring the right of way under such circumstances would be to indulge in mere speculation. In other words, this court says that what plaintiff in error is asking the court to require the Commission to do cannot, as a matter of law, be done. The court, however, does not stop here. It proceeds to demonstrate why such an estimate cannot be made. It shows that the uses and values of lands in the vicinity of the railroad are largely the result of the construction and operation of the railroad; that it would be

impossible to determine the extent to which such uses and values have been so influenced, and that to assume that they would not be affected if the railroad were removed, and base upon that theory an estimate of reacquiring the lands, or its equivalent, an estimate of the present cost of condemnation and damages, or of purchase, would be improper and unjustifiable and produce a result which could not be accepted as evidence by a court. This court clearly states, in substance, that the estimate of present cost of condemnation and damages, or of purchase, which plaintiff in error is asking the court to compel the Commission to make is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in the *Minnesota Rate Cases*, in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis.

As shown in the answer herein, the evidence introduced before the Commission in connection with the valuation of the lands included in plaintiff in error's railroad establishes that at the time the railroad was constructed a portion of said lands was donated to, and another portion purchased by, plaintiff in error, and that plaintiff in error obtained title to still another portion through condemnation proceedings. It is evident that, upon the assumption of the removal of the railroad and its reproduction, it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by plaintiff in error, or the portion thereof plaintiff in error would have to acquire title to through condemnation proceedings.

It is further apparent that the removal of the railroad and its immediate reproduction would not damage in any manner or to any extent any of the lands adjoining or adjacent to the railroad or the owners of such adjoining or adjacent lands.

It is also clear that to determine, upon the assumption of the removal of the railroad, that the title to the lands included therein would revert to or be vested in the owners of said adjoining lands, would be unjustifiable and improper.

The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do. *Silsby Mfg. Co.* v. *Allentown*, 153 Pa. St. 319.

The decision of this court in the *Minnesota Rate Cases* is directly in point and should be given controlling influence. *Chicago & Northwestern Ry. Co.* v. *Smith*, 210 Fed. Rep. 632; *Louisville & Nashville R. R. Co.* v. *Railroad Commission*, 208 Fed. Rep. 35; *Ann Arbor R. R. Co.* v. *Fellows*, 236 Fed. Rep. 387.

This court has approved the Commission's interpretation of the court's decision in the *Minnesota Rate Cases*. See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178.

In finding the present market value of plaintiff in error's common-carrier lands, as measured by the "fair average of the normal market value of lands in the vicinity having a similar character," the Commission must of course consider conditions as they now are, including the existence of the railroad, but in estimating what it would cost to reacquire such lands, that is, the reproduction cost, or the present cost of condemnation and damages or of purchase, of the lands, the Commission would have to treat the railroad as nonexistent and speculate, enter into the realm of mere conjecture, as to what the market value of the lands would be under such circumstances.

Plaintiff in error's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation, and is not justified by the facts. It is asking the court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others.

UNITED STATES AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 413. Argued December 10, 1919.—Decided March 8, 1920.

The Valuation Act of March 1, 1913, requires the Interstate Commerce Commission to ascertain and report, *inter alia*, the present cost of condemnation and damages or of purchase of the lands, rights of way and terminals of carriers in excess of their original cost or present value, apart from improvements. *Held*, that a refusal of the Commission to receive and act upon evidence to this end was not justified by the supposed impossibility of performing the statutory duty

Mr. W. G. Brantley, Mr. Sanford Robinson and *Mr. Leslie Craven*, by leave of court, filed a brief as *amici curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Act of Congress of March 1, 1913, c. 92, 37 Stat. 701, amending the "Act to regulate commerce," imposed the duty upon the Interstate Commerce Commission (§ 19a) to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act." Specifying the steps to be taken in the performance of the general duties thus imposed, the same section commanded as follows:

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier . . . the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. . . .

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

* * * * * * * * *

"Fifth. . . [7th par.]. Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, . . . stating the valuation placed upon the sev-

eral classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. . . .

"If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto. . . . All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty seven, commonly known as 'the Act to regulate commerce" and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Pursuant to these requirements the Commission proceeded to investigate and report the value of the property of the Kansas City Southern Railway Company. Upon completing a tentative valuation, the Commission gave the notice required by the statute to the Railway Company, which thereupon filed a protest against such valuation on the ground that in making it the Commission had failed to consider and include the "present cost of condemnation and damages or of purchase in excess of such original cost or present value." Upon the subject of the protest, the Railway Company took a large amount of testimony and much was also taken by the Commission, both parties having incurred considerable expense in the matter.

Pending this situation, in order that the excessive expense of taking each individual parcel and showing what it would cost to acquire it or a right of way over it by purchase or condemnation might be avoided, an agreement

was entered into between the Director of the Bureau of Valuation of the Commission, C. A. Prouty, and the Railway Company, that in the event the Commission should decide that evidence upon the cost of acquiring land by purchase or condemnation would be received by it, the Bureau of Valuation would recommend to the Commission the percentage or multiplier of the naked value of the land, to be used for the purpose of reaching the railway cost of acquiring the same.

At that time there was also pending a protest concerning a tentative valuation made by the Commission as to the property of the Texas Midland Railroad Company, raising the same question as to error committed in failing to carry out the provisions of the statute concerning the present cost of condemnation, etc., in which case the Commission overruled the protest, holding that the provision of the statute in question was not susceptible of being enforced or acted upon for reasons stated by the Commission in part as follows (1 I. C. C. Val. Rep. 54 *et seq.*):

"However, the direction in paragraph 'Second' for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of reproduction of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again, it is to be taken as not existent. It seems sophistry to contend that the lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

"Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier to pay sums in excess of the value of

the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights.

* * * * * * * *

"We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court [in the *Minnesota Rate Cases*] as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear.

* * * * * * * *

"Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto."

Applying the ruling thus made to the protest which was pending in this case, the Commission gave notice to the Railway that the agreement made with the Director of the Bureau of Valuation concerning the method of proof would be treated as not further operative; and thereafter when an offer was made by the Railway before an exam-

iner of the Commission of further testimony concerning the subject in hand, it was excluded because in conflict with the ruling announced in the *Midland Case*. The Commission sustained this action of the examiner on the ground that that officer had rightly held that the ruling in the *Midland Case* was controlling; and the Commission therefore decided that no further testimony on the particular subject would be heard in this case, and that it would make no report concerning that subject.

This suit was then brought to obtain a mandamus to compel the Commission to hear the proof and act upon it under the statute. The amended petition, after reciting the facts as we have outlined them and making the appropriate formal averments to justify resort to mandamus, alleged:

"That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by judicial award in condemnation proceedings during four years immediately preceding such valuation at an actual cost to relator of $180,000; and in the aggregate will result in a finding with respect to said lands at least $5,000,000 less than the value so directed by the Act of Congress above mentioned to be found."

It was further averred, with considerable elaboration, that the petitioner stood ready to produce proof to meet the requirements of the statute which was neither speculative nor impossible to be acted upon, since it would conform to the character of proof usually received in judicial proceedings involving the exercise of eminent domain.

The Commission in its answer, either stating or con-

ceding the history of the case as we have recited it, and summarily reiterating the grounds for the refusal by the Commission to receive the proof or report concerning it, challenged the right to the relief sought. A demurrer to the answer as stating no defense was overruled by the trial court, which denied relief without opinion. In the Court of Appeals, two judges sitting, the judgment of the trial court was affirmed by a divided court, also without opinion, and the case is here on writ of error to review that judgment.

It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters "beyond the possibility of rational determination," and called for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," and that such conclusions were the necessary consequence of the *Minnesota Rate Cases*, 230 U. S. 352.

We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken

conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the *Minnesota Rate Cases*, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the *Minnesota Rate* ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest though it be borne in mind that the *Minnesota Rate Cases* were decided after the passage of the act in question.

Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise.

The judgment of the Court of Appeals is therefore reversed with directions to reverse that of the Supreme Court and direct the Supreme Court to grant a writ of mandamus in conformity with this opinion.